REPORT
ON
COVENANTS AFFECTING FREEHOLD LAND

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

Ministry of the
Attorney
General

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The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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Anne McGarrigle, LLB

The Commission's office is located on the Eleventh Floor at 720 Bay Street, Toronto, Ontario, Canada, M5G 2K1.

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EXECUTIVE SUMMARY

In its *Report on Covenants Affecting Freehold Land*, the Ontario Law Reform Commission deals with both positive and restrictive covenants, or obligations, affecting land, other than those between landlord and tenant. A positive covenant is one that requires a person to do something on his or her land, whereas a restrictive covenant is one that prohibits a person from doing something on his or her land. In general, two parcels of land are involved: one that has the burden of the covenant, and one that has the benefit. The burden of a covenant is the duty to perform it, or the liability to be sued upon it, if not performed, while the benefit of a covenant is the right to enforce it.

In the Report, the Commission identifies two fundamental deficiencies in the law of covenants. As the principal difficulty, the Commission cites the fact that, except in the landlord and tenant context, the burden of a positive covenant does not run with land; that is, it cannot be enforced by the owner of the benefited land against subsequent owners of the burdened land. This rule often operates to defeat the legitimate expectations of the parties. For example, at present, if a person agrees with his or her neighbour that the neighbour, and those who purchase the neighbour's property in the future, will maintain a common fence or driveway, the obligation will not be binding on future owners of that property. Similarly, where the owners in a property development agree that they and subsequent owners of the various pieces of property will pay for the maintenance of amenities provided in the development, the obligation will not bind the future owners. In addition, the neighbour in the first example, and the original owners in the second, will remain liable for contraventions of the obligation even after they have sold their property.

The second problem the Commission identifies deals with restrictive covenants. Although both the benefit and the burden of restrictive covenants may run with land, the law in this respect is unduly complex and uncertain.

In order to address these deficiencies, two general recommendations are made. First, the Commission concludes that the law should be reformed to permit the burden of a positive covenant to run with land, so that it will be enforceable against subsequent owners of the burdened land. Secondly, the Commission recommends that the law of restrictive covenants should be reformed to remove the present complexity and uncertainty. These reforms will be accomplished through the creation of a new interest in land, referred to as a "land obligation". The Report includes numerous recommendations establishing a comprehensive scheme for the creation and operation of this new interest.

Land obligations will include both positive and restrictive obligations, and will permit both the benefit and the burden of such obligations to run with land. In addition, the benefit of a land obligation will be permitted to exist either as annexed or attached to land (referred to in the Report as the "dominant land"), or "in gross", that is, for the personal benefit of the person entitled to enforce it, without the necessity of it being attached to dominant land.

The Report recommends that any obligation should be capable of being imposed as a land obligation, including restrictive obligations, positive obligations, reciprocal payment obligations, positive user obligations, and access obligations. Moreover, the Commission concludes that it should be possible to include certain supplementary provisions in the instrument creating a land obligation, and that such provisions should take effect as part of the land obligation.

The Commission recommends that provision should be made for the creation of development schemes, under which land obligations might be imposed and become binding upon, and mutually enforceable by, the owners of the individual units comprising the scheme. A development scheme will be able to provide for different obligations to be imposed on different units, or for some units to be free from obligations. Moreover, a development scheme will be able to provide for the variation or extinguishment of any land obligation imposed under the scheme; and for any other matter desired by the parties.

While it should be possible for the several owners of units in the scheme to have mutual rights of enforcement, the Commission concludes that it should also be possible for the obligations imposed under the scheme to be enforced for the benefit of all persons who own land under the scheme. The Report recommends, therefore, that where a residents' association has been created, or a manager or other person has been appointed, under a development scheme, that person or association should have the power to enforce all land obligations imposed under the scheme, unless the development scheme provides to the contrary. In such a case, the obligation will not be enforceable by the individual owners of the units benefited by the obligation unless express provision to that effect is made in the development scheme.

The Report recommends that certain formal requirements should be satisfied in order to create a land obligation or a development scheme, and that both land obligations and development schemes should be registrable under the *Land Titles Act* and the *Registry Act*. Moreover, when a development scheme or a land obligation is submitted for registration, the Report recommends that it should be registered on the title to every parcel of land described in the instrument.

Where the benefit of a land obligation exists as annexed to land, the Commission concludes that the owner or occupier, from time to time, of all or part of the dominant land should be able to enforce the obligation. Where the benefit of a land obligation exists in gross, the owner of the benefit, from

time to time, should be able to enforce the obligation. However, once the owner of the dominant land has ceased to hold any interest in the land, or once the owner of a land obligation in gross has assigned the benefit of the obligation, the owner should no longer be able to enforce the obligation unless the parties have agreed expressly to the contrary.

The Commission concludes that it would be improper to impose the burden of certain types of land obligation on all persons who may have an interest in the land burdened by the obligation (referred to in the Report as the "servient land"). The Report recommends, therefore, that, subject to the exception noted below, restrictive and access obligations should be binding upon everyone who has an interest in, or who occupies, the servient land or any part thereof. Other land obligations, on the other hand, should be binding only on those persons who have certain substantial interests in the servient land. In accordance with the general rules of priority, however, the Report recommends that no one should be bound by a land obligation if he or she has priority over it by virtue of a prior registered interest. Finally, unless a contrary intention appears expressly in the creating instrument, the Commission concludes that the original maker of the land obligation should be discharged of the burden once he or she has parted with all interest in the land.

The Report recommends that all persons bound by positive obligations, reciprocal payment obligations, and positive user obligations should be liable for a contravention. By contrast, only the person bound by a restrictive or access obligation who actually committed the breach should be liable. However, where a person bound by a land obligation is a subsequent mortgagee, chargee, or holder of other security, the person should be liable for a breach of the land obligation only if he or she was in possession of the servient land at the time of the breach. The parties will be permitted to vary the above rules for the purpose of restricting the circumstances in which a person may be held liable for the contravention of a land obligation. Finally, the Report recommends that a right of contribution should exist among all persons who are liable for breach of a positive obligation, reciprocal payment obligation, or positive user obligation.

Since land obligations include both positive and restrictive obligations, the Commission concludes that the range of available remedies for breach of a land obligation should include not only injunctions and other equitable relief, but also damages for moneys due under a land obligation, and, subject to the exception noted below, damages for both pecuniary and non-pecuniary kinds of loss. The parties, however, would be free to provide that, on breach of a land obligation, one or more types of liability shall be excluded, either in whole or in part. Moreover, a person will be entitled to a remedy in respect of a contravention only to the extent to which he or she is materially prejudiced by the breach.

The Commission concludes that it would be oppressive to make common law damages available against certain persons with insubstantial interests in the servient land. Accordingly, the Report recommends that

common law damages should be available only against persons who hold specified interests in the servient land. Finally, the Commission concludes that, in any action for damages for breach of a land obligation, the right to damages should be reduced to the extent that the person enforcing the obligation has contributed to his or her own loss.

The Report includes several recommendations concerning the limitation period that should apply to actions in respect of land obligations. The Commission concludes that it should be the same as the limitation period for other actions in respect of land, that is, a period of ten years.

To enable a person to discover the identity of the person or persons liable in respect of a contravention, the Report recommends the establishment of a notice procedure that will permit a person entitled to enforce a land obligation to obtain the necessary information by service of a notice on anyone in occupation of the servient land, or anyone who has an interest in the servient land.

The Commission makes recommendations regarding a variety of methods by which land obligations and development schemes may be varied or extinguished. The Report includes several recommendations respecting the extinguishment of land obligations where all or part of the servient land, and all or part of the dominant land, come into the ownership of the same person. Similarly, the Report includes a recommendation respecting the extinguishment of development schemes, where all the units comprising the scheme come into the ownership of the same person. The Commission also concludes that although land obligations and development schemes should be extinguished automatically at the end of a period of forty years, it should be possible to renew a land obligation or development scheme. Moreover, the Report recommends that where some, but not all, of the persons bound by or entitled to enforce a land obligation agree in writing to vary the obligation, the variation should be binding not only upon the parties to it, but, provided it is registered on title, also upon subsequent owners and subsequent adverse possessors of all or part of the land.

The Report includes numerous recommendations respecting the extinguishment and variation of land obligations and development schemes by the court. In this connection, the Report recommends that the court should have the power to extinguish or vary any land obligation or development scheme, and that anyone interested in the servient land, including a purchaser under an agreement of purchase and sale, or a person with an option to purchase the land, should have the right to apply to the court for an order extinguishing or varying a land obligation or a development scheme. The Commission concludes that the court should have the power to order the extinguishment or variation of a development scheme or land obligation upon such terms and conditions as it believes to be appropriate, including the right to impose a new or additional obligation upon any person, provided the person consents to undertake the burden. As a condition of the variation or extinguishment of a land obligation, the court should be

empowered to direct that the applicant pay compensation to any person bound by the order for any loss or disadvantage the person will suffer as a result of its terms. Finally, the Report recommends that the court should be empowered to extinguish or vary a land obligation or development scheme on one or more of nine specific grounds.

The Report further recommends that the *Expropriations Act* should be amended to deal expressly with the expropriation of land either burdened or benefited by a land obligation.

With respect to the application of its proposals, the Commission concludes that, subject to certain exceptions, the existing rules respecting the running of covenants should continue to apply to existing covenants, but should not apply to land obligations created after the proposals take effect. Finally, since the present law of covenants will continue to apply in limited circumstances, the Commission makes several recommendations for reform of that law.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

GENERAL RECOMMENDATIONS

1. (1) Restrictive covenants should be retained.

   (2) The existing equitable doctrine of restrictive covenants should be reformed to remove the present complexity and uncertainty.

2. The law should be reformed to permit the burden of positive covenants to run upon a transfer of freehold land.

SPECIFIC RECOMMENDATIONS

THE LAND OBLIGATION: GENERAL

3. (1) A new interest in land, to be called a "land obligation", should be created in Ontario.

   (2) Land obligations should comprehend both positive and restrictive obligations, and should permit both the benefit and the burden of such obligations to run upon a transfer of freehold land.

   (3) A land obligation should be capable of existing as a legal or equitable estate in fee simple, for life, or for a term of years.

THE NECESSITY OF LAND OBLIGATIONS BEING APPURTENANT TO AN ESTATE

4. (1) The benefit of a land obligation, other than the benefit of a land obligation that exists in gross (see Recommendation 5), should be appurtenant to, and run with, the dominant land, not with an estate therein.

   (2) The burden of a land obligation should be appurtenant to, and run with, the servient land, not with an estate therein.

LAND OBLIGATIONS IN GROSS

5. The benefit of land obligations should be permitted to exist either as appurtenant to land or in gross, that is, without the necessity of dominant land.

THE CONTENT OF LAND OBLIGATIONS

6. Any obligation should be capable of being imposed as a land obligation, including:

    (a) restrictive obligations;

    (b) positive obligations;

    (c) reciprocal payment obligations;

    (d) positive user obligations; and

    (e) access obligations.

7. (1) It should be possible to include the following types of supplementary provision in the instrument creating a land obligation:

    (a) *Information*. A provision giving a right to information or to the production of documents.

    (b) *Inspection*. A provision enabling any person entitled to enforce a land obligation to inspect the servient land in order to see whether it has been complied with.

    (c) *Self-help*. A provision enabling anyone entitled to enforce a land obligation requiring the carrying out of works to enter the servient land and carry them out himself in the event of non-compliance.

    (d) *Fund*. A provision relating to the keeping of a fund out of which expenditure on the carrying out of works, or the provision of services, is to be met. A provision of this kind can be made whenever a works or services obligation is coupled with a reciprocal payment obligation, and can be made to take effect as part of either obligation.

    (e) *Interest*. A provision requiring the payment of interest if default is made in complying with a reciprocal payment obligation.

    (2) Supplementary provisions included in the instrument creating a land obligation should take effect as part of the land obligation.

DEVELOPMENT SCHEMES

8. (1) Provision should be made for the creation of development schemes, under which land obligations might be imposed and become binding upon, and mutually enforceable by, the owners of the individual units comprising the scheme.

(2) Any person should be permitted to create a development scheme.

(3) The instrument should define the land obligations to be imposed thereunder.

9. The dominant land and the servient land in respect of each land obligation imposed under a development scheme should be the specific unit or units benefited or bound by the particular obligation.

10. (1) A development scheme should be able to provide for different obligations to be imposed upon different units, or for some units to be free of obligations.

(2) A development scheme should be able to provide for the following:

(a) the variation or extinguishment of the scheme itself;

(b) the variation, release, apportionment and extinguishment of any land obligation imposed under the scheme; and

(c) any other matter desired by the parties.

11. (1) Where a manager, residents' association, or other person performing similar functions has been created or appointed under a development scheme, that person should have the power to enforce all land obligations imposed under the scheme, unless the development scheme provides to the contrary.

(2) Where a land obligation is enforceable by a manager, residents' association, or other person performing similar functions, the obligation should not be enforceable by the individual owners of the units benefited by the obligation, unless express provision to that effect is made in the development scheme.

12. The creator of a development scheme should be bound by the scheme and have rights of enforcement under it while he or she owns land subject to the scheme.

13. In addition to the ordinary case, in which a development scheme is created by a developer prior to the sale of the individual lots in a subdivision, the several owners of separate parcels of land, as well as a lessor, should be able to create a development scheme.

14. The benefit of a land obligation imposed under a development scheme should be permitted to exist either as appurtenant to land or in gross.

CREATION AND REGISTRATION OF LAND OBLIGATIONS AND DEVELOPMENT SCHEMES

15. (1) Development schemes and land obligations imposed outside of development schemes should be created only by instrument in writing, signed by the person or persons creating the development scheme or land obligation.

(2) There should be no requirement that a land obligation or a development scheme must be executed under seal.

16. (1) In respect of each development scheme, the instrument should state that it creates a development scheme, and it should describe the land to which it applies with the particularity required by the land registration statutes.

(2) In respect of each land obligation, whether or not such obligation is imposed under a development scheme, the instrument should state that it creates a land obligation, and it should describe both the servient land and, where the benefit of the obligation does not exist in gross, the dominant land with the particularity required by the land registration statutes.

17. In the event that the formal requirements are not satisfied, the instrument should be deemed conclusively not to create a land obligation or a development scheme (although, in such a case, the instrument might create a personal covenant or other obligation).

18. (1) Both land obligations and development schemes, including a subsequent variation or extinguishment thereof, should be registrable under the *Land Titles Act* and the *Registry Act*.

(2) When a development scheme or a land obligation, or a variation or extinguishment thereof, is submitted for registration, it should be registered on the title to every parcel described in the instrument.

(3) To the extent necessary, the *Land Titles Act* and the *Registry Act* should be amended to permit such registration.

19. (1) Upon first registration of land under the *Land Titles Act*, land burdened or benefited by a land obligation should be registered as subject to, or as having the benefit of, the obligation.

(2) A land obligation should not take effect as an overriding interest under section 47 of the *Land Titles Act*.

(3) Section 81(5) of the *Land Titles Act* should be amended to ensure that, in all cases, land obligations are entitled to priority according to the time of their registration.

(4) The *Land Titles Act* should be amended to provide expressly that a prior registered land obligation has priority over a subsequent unregistered lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it.

20. The *Registry Act* should be amended to provide as follows:

(a) that the doctrine of actual notice, contained in section 65(1), does not apply to land obligations; and

(b) that a prior registered land obligation has priority over a subsequent unregistered lease for a term not exceeding seven years where the actual possession goes along with the lease.

21. The rule against perpetuities, as amended by the *Perpetuities Act*, should not apply to land obligations.

THE BENEFIT OF LAND OBLIGATIONS

22. (1) Where the benefit of a land obligation exists as appurtenant to land, the owner or occupier, from time to time, of all or part of the dominant land should be able to enforce the obligation.

(2) (a) Subject to paragraph (b) below, where the benefit of a land obligation exists in gross, the owner of the benefit, from time to time, should be able to enforce the obligation.

(b) A subsequent owner of the benefit of a land obligation in gross should be able to enforce the obligation only if the benefit is assignable, and if it is in fact assigned.

23. Once the owner of the dominant land has ceased to hold any interest in that land, or, once the owner of a land obligation in gross has assigned the benefit of the obligation, as the case may be, the owner should no longer be able to enforce the obligation, unless the parties have agreed expressly to the contrary.

24. An adverse possessor of the dominant land should be able to enforce a land obligation, whether or not he or she has acquired an indefeasible title.

THE BURDEN OF LAND OBLIGATIONS

25. (1) Restrictive and access obligations should be binding upon everyone who, for the time being, has an estate or interest in, or who, for the time being, is in occupation of, the servient land or any part thereof.

(2) Land obligations, other than restrictive and access obligations, should be binding only upon the following persons, so long as they hold their interest in the servient land or any part thereof:

(a) persons who have a subsequent freehold interest and who have a right of possession;

(b) persons who hold an interest in a subsequent lease that is for a term exceeding twenty-one years and who have a right of possession;

(c) subsequent mortgagees and other encumbrancers;

(d) the person who created the land obligation, and his or her successors in title; and

(e) adverse possessors, whether or not they have acquired an indefeasible title.

26. (1) In accordance with the general rules of priority, no one should be bound by a land obligation if he or she has priority over it by virtue of a prior registered interest or if he or she acquired a derivative interest from, or occupies under, such a person.

(2) A lease referred to in section 65(2) of the *Registry Act* or section 47(1)4 of the *Land Titles Act* should not be bound by a subsequent land obligation.

27. It should be possible for the owner of the dominant land, or the owner of the benefit of a land obligation in gross, to postpone his or her priority in favour of a subsequent encumbrancer of the servient land.

28. The parties to a land obligation should be able to restrict the class of persons who should be bound by it.

29. Unless a contrary intention appears expressly in the creating instrument, the original maker of a land obligation should be discharged of the burden once he or she has parted with all interest in the land.

LIABILITY FOR CONTRAVENTIONS OF LAND OBLIGATIONS

30. (1) All persons bound by positive obligations, reciprocal payment

obligations and positive user obligations should be liable for a contravention.

(2) (a) Only the person bound by a restrictive or access obligation who actually committed the breach should be liable.

(b) Where a person bound by a restrictive or access obligation has permitted or suffered a breach to be committed by another person, the person bound by the obligation who permitted or suffered the breach should be held liable.

31. Subsequent mortgagees, chargees, and holders of other security should be liable for breach of a land obligation only if they were in possession of the servient land at the time of the breach.

32. Where a breach is of a continuing nature, the person or persons who caused the breach, as well as his or her, or their, successors, should remain and be liable so long as the breach continues.

33. The parties should be able to vary the rules set out in Recommendations 30-32, either in the original instrument creating the interest or in a subsequent instrument, for the purpose of restricting the circumstances in which a person may be held liable for the contravention of a land obligation.

34. In accordance with the recommendation made in our *Report on Contribution Among Wrongdoers and Contributory Negligence* that there should be a right of contribution among all concurrent wrongdoers, whatever the legal nature of their liability, a right of contribution should exist among all persons who are liable for breach of a positive obligation, reciprocal payment obligation, or positive user obligation.

REMEDIES FOR CONTRAVENTIONS

35. (1) The following remedies should be available upon a contravention of a land obligation:

(a) an injunction (including a mandatory injunction) or other equitable relief;

(b) damages for moneys due under a land obligation; and

(c) damages, both for pecuniary and non-pecuniary kinds of loss.

(2) An injunction should be available upon a threatened contravention of a land obligation.

36. A right of re-entry upon the servient land should not be permitted.

37. The parties to a land obligation should be free to provide, either in the original instrument creating the interest or in a subsequent instrument, that, on breach of a land obligation, one or more types of liability shall be excluded, either in whole or in part.

38. A person should be entitled to a remedy in respect of a contravention only to the extent to which he or she is materially prejudiced by the breach, in the capacity in which he or she is entitled to enforce the obligation.

39. Common law damages should be available only against the following:

    (a) the person who entered into the obligation and his or her successors in title;

    (b) a mortgagee; and

    (c) a person who has a right to possession and has either a freehold interest or a leasehold interest for a term exceeding twenty-one years.

40. In any action for damages for breach of a land obligation, the right to damages should be subject to any apportionment of damages due to the contributory fault or neglect of the person enforcing the obligation.

LIMITATION OF ACTIONS

41. (1) The limitation period applicable to actions in respect of land obligations should be the same as for other actions in respect of land, that is, a period of ten years.

    (2) The statutory ten year limitation period should apply expressly with respect to all remedies for breach of a land obligation, including equitable remedies.

    (3) (a) A cause of action for contravention of a land obligation should arise when the contravention occurs.

    (b) Subject to the ordinary statutory rules providing for the postponement, suspension, or extension of the limitation period in certain circumstances, and subject to paragraph (c) below, the limitation period in respect of a cause of action for contravention of a land obligation should begin to run when the cause of action arises.

    (c) Where the contravention is of a continuing nature, time should not start to run until the contravention has ceased.

Determining the Identity of Persons Liable

42. (1) Any person entitled to enforce a land obligation should be permitted to serve a notice upon anyone in occupation of the whole or any part of the servient land, or upon anyone who has, or who appears to have, an interest in the whole or any part of the servient land.

(2) The person served with the notice should be required to respond, in writing, within one month of the date of service, and should be required to include in his or her response the nature of any estate or interest he or she might have in the whole or any part of the servient land, as well as the name and address of any other person he or she knows or believes to have an estate or interest in the whole or any part of the servient land.

Extinguishment and Variation

Extinguishment by Common Ownership

43. A land obligation should be extinguished if the whole of the servient land and the whole of the dominant land come into the ownership of the same person, in the same right, and if no other person is bound by, or has the benefit of, the obligation.

44. Where part only of the dominant land and all or part of the servient land come into common ownership, land obligations should not be extinguished.

45. Where all of the dominant land and part only of the servient land come into common ownership:

(a) restrictive and access obligations should be extinguished to the extent that they relate to the part of the servient land that has come into common ownership; and

(b) land obligations other than restrictive and access obligations should not be extinguished.

46. There should be no extinguishment of a development scheme, or any land obligation imposed thereunder, unless all the units comprising the scheme come into the ownership of the same person, in the same right, and no one else is bound by or has the benefit of any land obligations imposed under the scheme.

47. Where a land obligation or a development scheme is extinguished pursuant to the other recommendations, any rights or liabilities that have accrued at the time of extinguishment should not be affected.

48. Where a lessee is bound by a land obligation that does not bind the lessor:

    (a) if the lease is merged in the reversion, the obligation should continue to bind the person who owns the estate resulting from the merger of the lease and the reversion for so long as the obligation would have bound the original creator; and

    (b) if the lease is forfeited by the landlord due to the fault of the lessee, the land obligation should terminate.

Extinguishment by Operation of the Recording Acts

49. Land obligations and development schemes should be extinguished automatically at the end of a period of forty years, unless renewed (see Recommendation 50).

50. (1) It should be possible, from time to time, to renew a land obligation or development scheme.

    (2) The *Land Titles Act* should be amended to permit the renewal of a land obligation or development scheme registered under that Act.

Extinguishment and Variation by the Parties

51. Where some, but not all, of the persons bound by or entitled to enforce a land obligation agree in writing to vary an obligation, the variation should be binding not only upon the parties to it, but, provided it is registered on title, also upon their successors and subsequent adverse possessors of all or part of their land.

Extinguishment and Variation by the Court

52. The court should have the power to extinguish or vary any land obligation (including any land obligation imposed under a development scheme) as well as any development scheme.

53. (1) Anyone interested in all or part of the servient land, including a purchaser under an agreement of purchase and sale, as well as an optionee, should have the right to apply to the court for an order extinguishing or varying a land obligation or a development scheme.

    (2) Anyone interested in servient land bound by a reciprocal payment obligation should be permitted to apply for the extinguishment or variation not only of the reciprocal payment obligation itself, but also of the services or works obligation to which it relates.

54. (1) The court should have the power to order the extinguishment or variation of a development scheme or land obligation, whether or not imposed under a development scheme, upon such terms and conditions as it deems appropriate.

(2) The power referred to in paragraph (1), above, should include the right to impose a new or additional obligation upon any person, provided the person consents to undertake the burden.

(3) Subject to paragraph (4), below, where an order is sought to extinguish or vary a development scheme, or a land obligation imposed under a development scheme, and the consent of a person is required to undertake a new or additional obligation sought to be imposed by the court as a condition of the extinguishment or variation, the court should be empowered to dispense with the necessity of such consent, for the benefit of the scheme as a whole, where such consent is unreasonably withheld, or where such consent cannot be obtained because the person whose consent is required is under a disability or cannot be found and where it would have been unreasonable for such person to withhold consent.

(4) The court should be able to dispense with consent under paragraph (3), above, only where it is satisfied that any prejudice caused to the person whose consent has been dispensed with would not outweigh substantially any benefit to such person resulting from the order.

(5) As a condition of the variation or extinguishment of a land obligation, the court should be empowered to direct that the applicant pay compensation to any person bound by the order for any loss or disadvantage the person will suffer as a result of its terms.

(6) The court should be empowered to give directions respecting the giving of notice to persons affected by the application.

55. (1) An order of the court varying or extinguishing a land obligation should bind everyone who is, or who becomes, bound by or entitled to enforce the obligation.

(2) An order of the court varying or extinguishing a development scheme should bind everyone who is, or who becomes, subject to the scheme.

(3) Where the order imposes new land obligations, it should specify expressly who is to be bound by it.

(4) An order of the court varying or extinguishing a land obligation or a development scheme should be registered on title to the land affected.

56. The court should be empowered to extinguish or vary a land obligation or a development scheme on one or more of the following grounds:

(a) that the land obligation has become obsolete by reason of changes in the character of the servient land or of the neighbourhood;

(b) that the change will not injure the persons who have the benefit of the obligation;

(c) that the persons of full age and capacity who have the benefit of the obligation have expressly or impliedly agreed to the proposed changes;

(d) that the proposed change would remove a factor prejudicial to the carrying out of the general purposes of a development scheme, and

(i) is for the benefit of the whole or part of the land subject to the scheme, and

(ii) the prejudice to any person bound by a land obligation under the scheme does not substantially outweigh the benefits it would give that person;

(e) that the land obligation, other than one requiring the payment of money,

(i) impedes some reasonable user of the land, or would do so unless modified,

(ii) secures no practical value to anyone who has the benefit of it, and

(iii) the person who has the benefit can be adequately compensated for any loss or disadvantage;

(f) with respect to positive obligations, that, as a result of a change in circumstances, the obligation

(i) has ceased to be reasonably practicable, or

(ii) has become unreasonably expensive compared to the benefit it confers;

(g) with respect to development schemes, or any provision contained in a development scheme, that, as a result of a change in circumstances, the scheme or the provision

(i) has become obsolete,

(ii) has ceased to be reasonably practicable, or

(iii) has become unreasonably expensive compared to the benefit it confers;

(h) that, in respect of a land obligation in gross, the person who owns the benefit secures no real or substantial benefit from it; and

(i) that a change is made necessary by an order of the court made on any of the other grounds.

57. In determining whether a particular land obligation, other than a land obligation requiring the payment of money, should be extinguished or varied on one of the above grounds, and in deciding whether a land obligation impedes some reasonable user of the land, within Recommendation 56(e), above, the court should take local planning matters into account.

Accrued Rights and Liabilities

58. Subject to the power of the court to order the extinguishment or variation of a development scheme or land obligation upon such terms and conditions as it deems appropriate (see Recommendation 54(1)), where a land obligation or a development scheme is extinguished or varied, any rights or liabilities that have accrued at the time of extinguishment or variation should not be affected.

Further Powers of the Court

59. The court should have the power, upon application, to declare:

(a) whether any land is, or, in any given circumstances would be, affected by a land obligation or a development scheme; and

(b) the nature and extent of a land obligation and whether the obligation is enforceable and, if so, by whom.

Court Having Jurisdiction

60. (1) A judge of the Supreme Court, or a judge of the District Court of the county or district in which the land subject to a land obligation or development scheme is situate, should have jurisdiction to entertain an application for extinguishment or variation, and to exercise the declaratory powers set out in Recommendation 59.

(2) The right to remove a matter into the Supreme Court and the right of appeal to the Divisional Court should be retained.

EXPROPRIATION

61. The *Expropriations Act* should be amended to provide as follows:

(a) where an expropriating authority acquires land that is dominant land in relation to a land obligation, it thereby acquires the benefit of the land obligation;

(b) where an expropriating authority acquires land that is servient land in relation to a land obligation, the land obligation is extinguished insofar as the use to which the authority intends to put the property is inconsistent with the land obligation, but not otherwise;

(c) where servient land is acquired by an expropriating authority for a limited time only, the land obligation is suspended for the period of the expropriation;

(d) the same rules apply where an expropriating authority acquires part of a development scheme;

(e) where an expropriating authority acquires land that is servient land in relation to a land obligation, the owner of the dominant land is entitled to claim compensation for injurious affection; and

(f) the above rules apply whether land is expropriated or acquired by agreement under the legislation.

CONSEQUENTIAL CHANGES IN THE EXISTING LAW

The Continuing Law of Covenants

62. (1) Subject to the exceptions noted in paragraph (2), below, the existing rules of law and equity respecting the running of the burden and the benefit of covenants should continue to apply to existing positive and restrictive covenants in freehold land, but should not apply to land obligations created after these proposals take effect.

(2) The recommendation contained in paragraph (1) should not apply to the following:

(a) the covenants for title implied by section 5 of the *Land Registration Reform Act, 1984*;

(b) leasehold covenants;

(c) the doctrine in *Halsall v. Brizell*; and

(d) a restrictive covenant that is created after our proposals take effect, but that is made pursuant to an obligation or right to enter into the covenant granted before that date.

Statutory Amendments

63. (1) The *Land Registration Reform Act, 1984*, Part III of the *Registry Act*, section 9(5) of the *Municipal Tax Sales Act, 1984*, and section 22 of the *Conveyancing and Law of Property Act*, should be amended to make specific reference to land obligations.

(2) The Ministries of the Government of Ontario should review the statutes for which they are responsible, for the purpose of identifying and implementing any further consequential amendments necessary to provide for land obligations.

Application to the Crown

64. The proposed regime respecting land obligations and development schemes should apply to the Crown in right of Ontario and, to the extent it is constitutionally permissible, to the Crown in right of Canada.

Other Changes in the Existing Law

65. The *Conveyancing and Law of Property Act* should be amended as follows:

(a) a provision should be added similar in effect to section 56 of the English *Law of Property Act 1925*;

(b) section 24 should be replaced by a provision similar in effect to section 78 of the *Law of Property Act 1925*;

(c) a provision similar in effect to section 79 of the *Law of Property Act 1925*, should be added;

(d) provisions similar in effect to sections 80, 82, and 83 of the *Law of Property Act 1925*, should be added; and

(e) a provision similar in effect to section 117 of the Trinidad and Tobago *Land Law and Conveyancing Act, 1981*, should be added.

RAPPORT

SUR

LES ENGAGEMENTS RELATIFS AUX BIENS-FONDS EN TENURE FRANCHE

Commission de réforme du droit de l'Ontario

SOMMAIRE

Ministère du Procureur Général

1989

La Commission de réforme du droit de l'Ontario a été constituée en vertu de la Loi sur la *Commission de réforme du droit de l'Ontario* avec pour mission de réformer le droit, les procédures et les institutions juridiques.

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Larry M. Fox, LLB

Avocats

Judith A. Bellis, BA, LLB

J. Jody Morrison, BA (Hon), LLM

Peter M. Sibenik, MA, LLB

Secrétaire et adjointe administrative

Anne McGarrigle, LLB

Les bureaux de la Commission sont situés au 11e étage du 720, rue Bay, Toronto (Ontario), Canada, M5G 2K1.

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SOMMAIRE

Dans son rapport intitulé *Report on Covenants Affecting Freehold Land*, la Commission de réforme du droit de l'Ontario se penche sur la question des engagements positifs et restrictifs, c'est-à-dire des obligations touchant un bien-fonds autres que celles qui s'appliquent à la propriété à bail. Un engagement positif est celui qui exige l'accomplissement d'un acte par une personne sur son bien-fonds. L'engagement restrictif, par contre, est celui qui empêche une personne d'accomplir un acte sur son bien-fonds. Un engagement suppose en général l'existence de deux biens-fonds distincts: d'une part la parcelle qui a le fardeau de l'engagement et, de l'autre, celle qui a le bénéfice de l'engagement. Le fardeau de l'engagement consiste en l'obligation d'exécuter cet engagement sous peine de poursuite judiciaire, tandis que le bénéfice de l'engagement est le droit d'en obtenir l'exécution.

Dans son rapport, la Commission soulève deux lacunes fondamentales en ce qui concerne le droit relatif aux engagements. La plus importante, selon la Commission, réside en ce que, en dehors de la propriété à bail, le fardeau d'un engagement positif ne suit pas le bien-fonds, autrement dit le propriétaire du fonds auquel est rattaché le bénéfice de l'engagement ne peut le faire exécuter par les propriétaires subséquents du bien-fonds portant le fardeau de l'engagement. L'application de cette règle frustre les attentes légitimes des parties. Par exemple, à l'heure actuelle, si une personne s'entend avec son voisin pour que celui-ci et les futurs acquéreurs de son bien-fonds entretiennent une clôture ou une allée en commun, l'obligation ne liera pas les futurs propriétaires de ce bien-fonds. De façon analogue, si les propriétaires d'un complexe immobilier s'entendent pour que les propriétaires actuels et futurs des divers éléments du complexe contribuent aux frais d'entretien des commodités comprises dans le complexe, l'obligation ne liera pas les futurs propriétaires. De plus, le voisin visé dans le premier exemple et les propriétaires primitifs dans le second auront toujours à répondre des violations de l'obligation après l'aliénation de leur bien.

Le deuxième problème soulevé par la Commission a trait aux engagements restrictifs. En effet, quoique le bénéfice et le fardeau d'un engagement restrictif suivent tous deux en général le bien-fonds, les règles de droit à ce sujet sont trop vagues et touffues.

Deux recommandations visent particulièrement ces lacunes. La Commission conclut tout d'abord que le droit devrait être réformé de façon à ce que le fardeau d'un engagement positif suive le bien-fond. Deuxièmement, la Commission recommande que le droit relatif aux engagements restrictifs soit modifié de façon à éliminer l'incertitude et la complexité qui le caractérise. La Commission prévoit à cet égard la création d'un intérêt

foncier nouveau qui s'intitulerait "obligation foncière". Le rapport comporte de nombreuses recommandations mettant de l'avant un plan d'ensemble pour la mise en oeuvre de ce nouveau type d'intérêt.

Les obligations foncières engloberaient à la fois les obligations positives et restrictives et permettraient que le bénéfice et le fardeau de l'obligation suivent le bien-fonds. Par ailleurs, le bénéfice d'une obligation foncière pourrait soit se rattacher au bien-fonds ou, au contraire, en être indépendant, en ce sens que le bénéfice de l'obligation constituerait un avantage personnel pour la personne fondée à le faire exécuter, sans pour autant suivre le fonds dominant.

Le rapport recommande que toutes les obligations, y compris les obligations restrictives, les obligations positives, les obligations de paiement réciproque, les obligations d'usage positif et les obligations de donner accès, puissent constituer des obligations foncières. De plus, on devrait pouvoir, selon la Commission, insérer, dans l'acte constitutif d'une obligation foncière, certaines stipulations supplémentaires qui deviendraient indissociables de l'obligation foncière.

La Commission recommande que l'on permette la création de projets d'aménagement donnant lieu à des obligations foncières applicables aux propriétaires d'unités individuelles comprises dans le projet et que ceux-ci pourraient invoquer mutuellement. Un projet d'aménagement permettrait la création d'obligations diverses en fonction des unités en cause, certaines de ces unités pouvant même être franches de toute obligation. Un projet d'aménagement pourrait également prévoir les modalités de modification ou d'extinction des obligations foncières connexes ainsi que toute autre modalité voulue par les parties.

Tout en reconnaissant qu'il est souhaitable pour les différents propriétaires d'unités du projet de pouvoir exiger mutuellement l'exécution des obligations, la Commission recommande qu'il soit également possible que le respect des obligations constituées dans le cadre du projet soit assuré par une tierce partie pour le compte de toutes les personnes qui possèdent un bien-fonds dans le projet. Le rapport recommande donc que, dans les cas où il existe soit une association ou un gérant ou autre personne nommée dans le cadre d'un projet d'aménagement, l'association ou la personne en question soit habilitée à faire exécuter toutes les obligations foncières relatives au projet, sauf si le projet d'aménagement stipule le contraire. Les propriétaires d'unités auxquelles se rattache le bénéfice d'une obligation ne pourraient alors faire exécuter l'obligation en leur propre nom, sauf si le projet d'aménagement stipule le contraire.

Le rapport recommande de subordonner la constitution d'obligations foncières ou d'un projet d'aménagement au respect de certaines formalités particulières et de rendre les obligations foncières et les projets d'aménagement enregistrables sous le régime de la *Loi sur l'enregistrement*

des droits immobiliers et de la *Loi sur l'enregistrement des actes*. De plus, lorsqu'un projet d'aménagement ou une obligation foncière sont présentés en vue de leur enregistrement, le rapport recommande que l'enregistrement s'effectue sur le titre de chaque parcelle de bien-fonds décrit dans l'acte.

La Commission recommande que, dans les cas où le bénéfice d'une obligation se rattache à un bien-fonds, le propriétaire ou l'occupant actuel de la totalité ou d'une partie du fonds dominant puisse faire exécuter l'obligation. D'autre part, lorsque le bénéfice de l'obligation foncière est indépendant du bien-fonds, le titulaire actuel du bénéfice devrait pouvoir faire exécuter l'obligation. Par contre, dès que le propriétaire du fonds dominant ne possède plus d'intérêt sur le bien-fonds ou dès que le titulaire d'une obligation foncière indépendante cède le bénéfice de l'obligation, le propriétaire ne devrait plus pouvoir faire exécuter l'obligation, sauf si les parties ont stipulé le contraire.

La Commission est d'avis qu'il ne faudrait pas assujettir toutes les personnes possédant un intérêt sur un bien-fonds auquel se rattache certains types d'obligations foncières au fardeau de ces obligations (bien-fonds que le rapport désigne comme étant le fonds servant). Par conséquent, le rapport recommande que, sous réserve des remarques ci-après, les obligations restrictives et les obligations d'accès s'appliquent à quiconque possède un intérêt sur la totalité ou une partie du fonds servant ou à quiconque l'occupe. Les autres types d'obligations foncières, par contre, ne devraient s'appliquer qu'aux personnes ayant un intérêt tangible sur le fonds servant. Conformément aux règles générales de rang, cependant, le rapport recommande que nul ne soit lié par une obligation foncière si l'intérêt qu'il possède sur le bien-fonds est de rang supérieur à l'obligation, du fait que l'intérêt a été enregistré avant l'obligation. Finalement, la Commission recommande qu'à moins d'une intention contraire ressortant de l'acte constitutif, le constituant de l'obligation foncière soit libéré du fardeau de celle-ci dès qu'il s'est départi de son intérêt sur le bien-fonds.

Le rapport recommande que les personnes assujetties à une obligation positive, à une obligation de paiement réciproque ainsi qu'à une obligation d'usage positif soient tenues responsables de la violation de celle-ci. Cependant, dans le cas d'une obligation restrictive ou d'accès, seule la personne qui y est assujettie et l'enfreint elle-même aurait à répondre de la violation. Par ailleurs, lorsque la personne assujettie à une obligation foncière est un créancier hypothécaire ou un titulaire de charge subséquents ou le titulaire subséquent d'une autre sûreté, elle ne devrait répondre d'une violation que si elle avait la possession du fonds servant au moment de la violation. Les parties auraient, de plus, la possibilité de modifier les règles susmentionnées afin de préciser davantage les circonstances dans lesquelles une personne aurait à répondre de la violation d'une obligation foncière. Le rapport recommande enfin que toutes les personnes assujetties à une obligation positive, à une obligation de paiement réciproque ou à une obligation

d'usage positif, puissent opposer un droit de répartition en cas de violation de celle-ci.

Étant donné que les obligations foncières englobent les obligations positives et les obligations restrictives, la Commission est d'avis que parmi les différents recours disponibles en cas de violation d'une obligation foncière devrait figurer non seulement les injonctions et autres mesures de redressement en equity, mais également les dommages-intérêts pour recouvrement d'une créance fondée sur une obligation et, sous réserve des remarques ci-après, les dommages-intérêts pour préjudice pécuniaire et non pécuniaire. Les parties pourraient toujours stipuler, cependant, que la violation d'une obligation n'entraîne pas tel ou tel type de responsabilité ou du moins en partie seulement. De plus, une personne ne pourrait exercer un recours par suite d'une violation qu'en proportion du préjudice tangible qu'elle a subi.

La Commission estime qu'il serait abusif d'exercer un recours en dommages-intérêts en common law contre des personnes n'ayant qu'un vague intérêt sur le fonds servant. Par conséquent, le rapport recommande que l'action en dommages-intérêts en common law puisse être intentée seulement contre des personnes possédant un intérêt précis sur le fonds servant. La Commission estime enfin que dans une action en dommages-intérêts pour violation d'une obligation foncière, le droit aux dommages-intérêts devrait être réduit en proportion du préjudice que la personne qui fait exécuter l'obligation a elle-même occasionné.

Le rapport comporte un certain nombre de recommandations visant les délais de prescription applicables aux actions pour violation d'une obligation foncière. La Commission est d'avis que ces délais devraient être identiques à ceux qui s'appliquent aux autres actions visant un bien-fonds, c'est-à-dire 10 ans.

Afin de permettre à une personne de déterminer l'identité du ou des responsables d'une violation, le rapport recommande l'adoption de certaines modalités de communication d'un avis qui permettraient à la personne ayant le droit de faire exécuter une obligation foncière d'obtenir les renseignements nécessaires en signifiant un avis à quiconque occupe le fonds servant ou à quiconque possède un intérêt sur le fonds servant.

La Commission recommande toute une série de procédés par lesquels il serait possible de modifier des obligations foncières ou des projets d'aménagement, ou d'y mettre fin. Le rapport comporte plusieurs recommandations visant l'extinction d'obligations foncières lorsque la propriété du fonds servant et du fonds dominant est réunie en totalité ou en partie entre les mains d'une seule personne. De façon analogue, le rapport comporte une recommandation concernant l'extinction de projets d'aménagement dans les cas où la propriété de toutes les unités faisant partie du projet est réunie entre les mains d'une même personne. La Commission

estime également que, bien que les obligations foncières et les projets d'aménagement devraient prendre fin d'eux-mêmes après quarante ans, il devrait être possible de les reconduire. De plus, le rapport recommande que lorsque certaines des personnes assujetties à une obligation foncière ou ayant le droit de la faire exécuter s'entendent par écrit pour la modifier, la modification ne devrait lier que les parties à l'entente, sauf si la modification est enregistrée sur le titre, auquel cas elle lierait tous les propriétaires subséquents ainsi que les possesseurs adversatifs subséquents d'une partie ou de la totalité du bien-fonds.

Le rapport comporte de nombreuses recommandations portant sur l'extinction et la modification d'obligations foncières et de projets d'aménagement par les tribunaux. Le rapport recommande à cet égard que les tribunaux soient habilités à mettre fin à une obligation foncière ou à un projet d'aménagement, ou à les modifier et que toute personne possédant un intérêt sur un fonds servant, y compris l'acquéreur éventuel en vertu d'une promesse d'achat, ou le détenteur d'une option d'achat du bien-fonds devraient pouvoir demander au tribunal une ordonnance visant à éteindre ou à modifier une obligation foncière ou un projet d'aménagement. La Commission est d'avis que le tribunal devrait pouvoir rendre une ordonnance d'extinction ou de modification d'un projet d'aménagement ou d'une obligation foncière selon les modalités qu'il estime appropriées, y compris l'imposition à toute personne d'une obligation nouvelle ou supplémentaire, à condition que cette personne en accepte le fardeau. Le tribunal devrait pouvoir imposer au requérant, comme condition de modification ou d'extinction de l'obligation foncière, l'obligation de verser une somme à toute personne visée par l'ordonnance, à titre de compensation pour le préjudice ou l'inconvénient qu'elle aurait subi. Finalement, le rapport recommande que le tribunal puisse éteindre ou modifier une obligation foncière ou un projet d'aménagement pour l'un ou plusieurs des neuf motifs précisés.

Le rapport recommande en outre que la *Loi sur l'expropriation* soit modifiée de façon à s'appliquer spécifiquement à l'expropriation d'un bien-fonds auquel se rattache le fardeau ou le bénéfice d'une obligation foncière.

Quant à la mise en oeuvre de ses recommandations, la Commission estime que, hormis quelques exceptions, le droit actuel relatif aux engagements visant un bien-fonds devrait continuer à s'appliquer aux engagements déjà en vigueur mais non aux obligations foncières constituées après la mise en oeuvre des recommandations. Finalement, étant donnée que le droit actuel relatif aux engagements continuerait à s'appliquer dans une certaine mesure, certaines des recommandations de la Commission visent plus particulièrement à réformer cet aspect du droit.

RÉSUMÉ DES RECOMMANDATIONS

La Commission formule les recommandations suivantes :

RECOMMANDATIONS GÉNÉRALES

1. (1) Il faudrait conserver les engagements restrictifs.

   (2) La doctrine d'equity relative aux engagements restrictifs devrait être réformée en vue d'éliminer sa complexité et son incertitude actuelles.

2. Le droit devrait être réformé afin de permettre que le fardeau d'engagements positifs suivent le bien-fonds lors de l'aliénation de celui-ci.

RECOMMANDATIONS PARTICULIÈRES

L'OBLIGATION FONCIÈRE : DISPOSITIONS GÉNÉRALES

3. (1) Il y aurait lieu de créer en Ontario un nouveau type d'intérêt portant l'appellation d' "obligation foncière".

   (2) Les obligations foncières devraient englober les obligations positives et restrictives et permettre que le bénéfice et le fardeau de ces obligations suivent le bien-fonds lors de l'aliénation de celui-ci.

   (3) Une obligation foncière devrait pouvoir constituer, en common law ou en equity, un domaine en fief simple, un domaine viager ou un terme d'années.

NÉCESSITÉ POUR UNE OBLIGATION DE SE RATTACHER À UN DOMAINE

4. (1) Le bénéfice d'une obligation foncière autre qu'un bénéfice indépendant d'un bien-fonds (voir la recommandation 5), devrait se rattacher au fonds dominant et non à un domaine dans celui-ci, et suivre le fonds dominant.

   (2) Le fardeau d'une obligation foncière devrait se rattacher au fonds servant et non à un domaine dans celui-ci, et suivre le fonds servant.

OBLIGATIONS FONCIÈRES INDÉPENDANTES

5. Le bénéfice d'une obligation foncière devrait pouvoir soit se rattacher à un bien-fonds ou être indépendant de celui-ci, c'est-à-dire pouvoir exister sans pour autant qu'il y ait un fonds dominant.

MODALITÉS ENTOURANT LA CONSTITUTION DES OBLIGATIONS FONCIÈRES

6. Il devrait être possible de constituer une obligation foncière à partir d'une obligation quelconque, et notamment de constituer :

   (a) une obligation restrictive;

   (b) une obligation positive;

   (c) une obligation de paiement réciproque;

   (d) une obligation d'usage positif;

   (e) une obligation d'accès.

7. (1) Les stipulations supplémentaires suivantes devraient pouvoir être insérées dans l'acte constitutif de l'obligation :

   (a) *Information*. Soit une stipulation donnant le droit d'obtenir des renseignements ou des documents.

   (b) *Inspection*. Soit une stipulation permettant au titulaire du bénéfice d'une obligation foncière d'inspecter le fonds servant afin de vérifier si l'obligation est respectée.

   (c) *Droit d'intervention*. Soit une stipulation permettant au titulaire du bénéfice d'une obligation foncière d'entrer sur le fonds servant et d'effectuer lui-même des travaux en cas d'inobservance de l'obligation.

   (d) *Fonds de réserve*. Soit une stipulation prévoyant la constitution d'un fonds de réserve dans lequel puiser advenant le cas où il faille procéder à l'exécution de travaux ou à la prestation d'un service. Ce genre de stipulation conviendrait plus particulièrement aux situations où l'obligation d'effectuer des travaux ou de fournir un service est jumelée à une obligation de paiement réciproque et peut être formulée de façon à s'assimiler à l'une ou l'autre obligation.

   (e) *Intérêts*. Soit une stipulation exigeant le versement d'intérêts en cas de violation d'une obligation de paiement réciproque.

   (2) Les stipulations supplémentaires insérées dans l'acte constitutif

d'une obligation foncière devraient faire partie intégrante de celle-ci.

PROJETS D'AMÉNAGEMENT

8. (1) Il y aurait lieu de permettre la création de projets d'aménagement stipulant que les propriétaires d'unités individuelles faisant partie du projet sont assujettis à des obligations foncières réciproques.

(2) Tout individu devrait pouvoir constituer un plan d'aménagement.

(3) L'acte constitutif du projet devrait préciser les obligations foncières qui en découlent.

9. Le fonds dominant et le fonds servant visés par chaque obligation foncière découlant d'un projet d'aménagement devraient correspondre à l'une ou plusieurs des unités précises auxquelles se rattachent le bénéfice ou le fardeau de l'obligation.

10. (1) Un projet d'aménagement devrait prévoir diverses obligations foncières en fonction des unités en cause, ou même prévoir que certaines unités sont franches de toute obligation foncière.

(2) Un projet d'aménagement devrait permettre à la fois :

(a) la modification ou l'extinction du projet même;

(b) la modification, la libération, le démembrement et l'extinction de toute obligation foncière prévue dans le cadre du projet;

(c) toute autre modalité voulue par les parties.

11. (1) Lorsqu'une association de résidents est constituée ou qu'un gérant ou autre préposé est nommé dans le cadre d'un projet d'aménagement, l'association ou la personne nommée devrait être habilitée à faire exécuter toutes les obligations foncières découlant du projet d'aménagement, sauf stipulation contraire contenue dans le projet.

(2) Lorsqu'une personne ou une association est habilitée à faire exécuter les obligations, les propriétaires d'unités individuelles auxquelles est rattaché le bénéfice d'une obligation ne devraient pas pouvoir la faire exécuter, sauf stipulation contraire contenue dans le projet d'aménagement.

12. L'auteur d'un projet d'aménagement devrait être lié par le projet et

pouvoir faire exécuter les obligations foncières qui en découlent tant qu'il demeure propriétaire du bien-fonds visé par le projet.

13. En plus du cas usuel où un projet d'aménagement est constitué par un promoteur immobilier avant la vente des lots individuels faisant partie d'un lotissement, il devrait être possible pour des propriétaires de bien-fonds individuels ainsi que pour des locateurs de constituer un projet d'aménagement.

14. Le bénéfice d'une obligation foncière découlant d'un projet d'aménagement devrait pouvoir se rattacher au bien-fonds ou en être indépendant.

CONSTITUTION ET ENREGISTREMENT D'OBLIGATIONS FONCIÈRES ET DE PROJETS D'AMÉNAGEMENT

15. (1) La seule façon de constituer un projet d'aménagement ainsi qu'une obligation foncière ne découlant pas nécessairement d'un projet d'aménagement devrait être par acte signé par l'auteur du projet d'aménagement ou de l'obligation foncière.

(2) Une obligation foncière ou un projet d'aménagement ne devraient pas nécessairement être constitués par acte scellé.

16. (1) En ce qui concerne les projets d'aménagement, l'acte devrait énoncer expressément qu'il vise à constituer un projet d'aménagement et décrire les biens-fonds en cause, avec toute la précision exigée par les lois relatives à l'enregistrement immobilier.

(2) En ce qui concerne les obligations foncières découlant ou non d'un projet d'aménagement, l'acte devrait énoncer expressément qu'il vise à constituer une obligation foncière et décrire le fonds servant en cause ainsi que, dans le cas d'une obligation qui n'est pas indépendante, le fonds dominant en cause, avec toute la précision exigée par les lois relatives à l'enregistrement immobilier.

17. Advenant le cas où les formalités ne sont pas respectées, l'acte serait réputé en définitive ne pas constituer une obligation foncière ou un projet d'aménagement (quoique, en pareil cas, l'acte pourrait avoir pour effet de créer un engagement personnel ou une autre obligation).

18. (1) Les obligations foncières et les projets d'aménagement, y compris toute opération subséquente visant à les modifier ou y mettre fin, devraient être enregistrables sous le régime de la *Loi sur l'enregistrement des droits immobiliers* et de la *Loi sur l'enregistrement des actes*.

(2) Les opérations visant à constituer, à modifier un projet

d'aménagement ou une obligation foncière, ou à y mettre fin, présentées pour enregistrement devraient être enregistrées sur le titre de chaque parcelle visée par l'acte.

(3) La *Loi sur l'enregistrement des droits immobiliers* et la *Loi sur l'enregistrement des actes* devraient être modifiées pour permettre l'enregistrement de ces opérations.

19. (1) Le premier enregistrement effectué sous le régime de la *Loi sur l'enregistrement des droits immobiliers* d'un bien-fonds auquel se rattache le fardeau ou le bénéfice d'une obligation foncière, devrait faire état de l'existence du fardeau ou du bénéfice en cause.

(2) Une obligation foncière ne peut avoir préséance sur les droits et servitudes prévus à l'article 47 de la *Loi sur l'enregistrement des droits immobiliers*.

(3) L'article 81(5) de la *Loi sur l'enregistrement des droits immobiliers* devrait être modifié de façon à prévoir que les obligations prennent toujours rang suivant le moment de leur enregistrement.

(4) La *Loi sur l'enregistrement des droits immobiliers* devrait être modifiée de façon à prévoir expressément qu'une obligation foncière enregistrée précédemment a préséance sur un bail ou une convention à fin de bail subséquente non enregistré dont la durée à courir est d'au plus trois ans et qui est accompagné d'une possession de fait.

20. La *Loi sur l'enregistrement des actes* devrait être modifiée de façon à prévoir que :

(a) la doctrine de connaissance réelle visée à l'article 65(1) ne s'applique pas aux obligations foncières;

(b) une obligation enregistrée précédemment a préséance sur un bail subséquent non enregistré dont la durée à courir est d'au plus sept ans et qui est accompagné d'une possession de fait.

21. La règle d'interdiction de perpétuités, dans sa version modifiée par la *Loi sur la durée des substitutions*, ne devrait pas s'appliquer aux obligations foncières.

LE BÉNÉFICE D'OBLIGATIONS FONCIÈRES

22. (1) Lorsque le bénéfice d'une obligation foncière se rattache à un bien-fonds, le propriétaire ou l'occupant actuel de la totalité ou d'une partie du fonds dominant devrait pouvoir faire exécuter l'obligation.

(2) (a) Sous réserve de l'alinéa b) ci-dessous, lorsque le bénéfice d'une obligation foncière est indépendant d'un bien-fonds, le titulaire actuel du bénéfice devrait pouvoir la faire exécuter.

(b) Le titulaire subséquent du bénéfice d'une obligation foncière indépendante devrait pouvoir la faire exécuter, à condition toutefois que le bénéfice soit cessible et ait fait l'objet d'une cession.

23. Dès que le propriétaire du fonds dominant ne possède plus d'intérêt sur le bien-fonds, ou dès que le titulaire d'une obligation foncière indépendante a cédé le bénéfice de l'obligation, le propriétaire ou le titulaire, selon le cas, ne devrait plus pouvoir faire exécuter l'obligation, sauf stipulation contraire des parties.

24. Le possesseur adversatif d'un fonds dominant devrait pouvoir faire exécuter une obligation foncière, sans égard au caractère défectible de son titre.

LE FARDEAU D'OBLIGATIONS FONCIÈRES

25. (1) Les obligations restrictives et d'accès devraient lier quiconque possède un domaine ou un intérêt sur la totalité ou une partie du fonds servant ou quiconque l'occupe.

(2) Les obligations foncières autres que les obligations restrictives ou d'accès, ne devraient lier que les personnes suivantes, tant qu'elles possèdent un intérêt sur la totalité ou une partie du fonds servant :

(a) les personnes possédant un intérêt subséquent en tenure franche et qui détiennent le droit de possession;

(b) les personnes possédant un intérêt dans un bail subséquent pour un terme d'années d'au plus 21 ans et qui détiennent le droit de possession;

(c) les créanciers hypothécaires et autres bénéficiaires de charge subséquents;

(d) le constituant de l'obligation foncière ainsi que ses successeurs en titre;

(e) les possesseurs adversatifs, sans égard au caractère défectible de leur titre.

26. (1) Conformément aux règles de rang, une obligation foncière ne devrait pas s'appliquer à une personne qui possède un intérêt de rang supérieur à l'obligation, du fait de l'enregistrement antérieur de son intérêt, ni s'appliquer à une personne qui tient son intérêt de

la personne possédant l'intérêt supérieur ou qui occupe le bien-fonds en vertu de l'intérêt supérieur de cette personne.

(2) Le bail visé à l'article 65(2) de la *Loi sur l'enregistrement des actes* ou à l'article 47(1) de la *Loi sur l'enregistrement des droits immobiliers* ne devrait pas être assujetti à une obligation foncière subséquente.

27. Le propriétaire d'un fonds dominant ou le titulaire du bénéfice d'une obligation foncière indépendante devrait pouvoir céder son rang en faveur du bénéficiaire subséquent d'une charge grevant le fonds servant.

28. Les parties à une obligation foncière devraient pouvoir circonscrire la catégorie de personnes assujettie à l'obligation.

29. Sauf stipulation contraire des parties dans l'acte constitutif d'une obligation foncière, le constituant de l'obligation devrait être libéré du fardeau de celle-ci dès qu'il se départit de la totalité de sont intérêt sur le bien-fonds.

RESPONSABILITÉ EN CAS DE VIOLATION D'OBLIGATIONS FONCIÈRES

30. (1) Quiconque est assujetti à une obligation positive, à une obligation de paiement réciproque ou à une obligation d'usage positif devraient répondre de la violation de celle-ci.

(2) (a) Seule la personne qui est assujettie à une obligation restrictive ou à une obligation d'accès et qui enfreint celle-ci devrait répondre de la violation de celle-ci.

(b) Quiconque est assujetti à une obligation restrictive ou à une obligation d'accès et tolère ou permet la violation de celle-ci par un tiers devrait répondre de la violation.

31. Un créancier hypothécaire, un titulaire de charge ou le titulaire d'une autre sûreté subséquents devraient répondre de la violation d'une obligation foncière s'ils avaient la possession du fonds servant au moment de la violation.

32. Lorsqu'une violation se poursuit, quiconque a occasionné la violation devrait répondre de celle-ci, ainsi que ses successeurs, pour toute la durée de la violation.

33. Les parties devraient pouvoir modifier les règles prévues par les recommandations 30 à 32, au moment d'établir l'acte constitutif de leur intérêt ou un acte subséquent, afin de circonscrire les circonstances

dans lesquelles une personne aurait à répondre de la violation d'une obligation foncière.

34. Conformément aux recommandations contenues dans notre rapport intitulé *Report on Contribution Among Wrongdoers and Contributory Negligence* selon lesquelles les co-auteurs d'une faute devraient pouvoir invoquer un droit de répartition de la responsabilité, indépendamment de la nature juridique de celle-ci, il y aurait lieu de prévoir un droit de répartition pour tous ceux qui se sont rendus responsables de la violation d'une obligation positive, d'une obligation de paiement réciproque ou d'une obligation d'usage positif.

RECOURS EN CAS DE VIOLATION

35. (1) Les recours suivants devraient exister en cas de violation d'une obligation foncière :

(a) le recours en injonction (y compris l'injonction impérative) ou autre mesure de redressement en equity;

(b) le recours en dommages-intérêts pour le recouvrement d'une créance relative à une obligation foncière;

(c) le recours en dommages-intérêts pour préjudice pécuniaire et non pécuniaire.

(2) Il devrait être possible de recourir à l'injonction en cas de violation appréhendée d'une obligation foncière.

36. Il ne devrait pas exister de droit de rentrée à l'égard d'un fonds servant.

37. Les parties à une obligation foncière devraient être libres de stipuler, soit dans l'acte constitutif de leur intérêt ou dans un acte subséquent, que la violation d'une obligation foncière n'entraîne que certains types particuliers de responsabilité.

38. Une personne ne devrait pouvoir exercer un recours par suite de la violation d'une obligation foncière qu'en proportion du préjudice tangible qu'elle a subi et à condition d'avoir qualité pour faire exécuter l'obligation.

39. L'action en dommages-intérêts en common law ne devrait pouvoir être intentée que contre les personnes suivantes :

(a) la personne ayant contracté l'obligation ainsi que ses successeurs en titre;

(b) un créancier hypothécaire;

(c) la personne qui détient un droit de possession et possède également soit un intérêt franc ou un intérêt à bail d'une durée supérieure à vingt et un ans.

40. Dans toute action en dommages-intérêts pour violation d'une obligation foncière, les dommages-intérêts exigibles devraient être réduits en proportion de la faute ou de la négligence contributives de la personne qui fait exécuter l'obligation.

DÉLAIS DE PRESCRIPTION

41. (1) Les délais de prescription applicables aux actions visant des obligations foncières devraient être identiques aux délais applicables aux autres actions visant un bien-fonds, c'est-à- dire dix ans.

(2) Le délai légal de prescription de dix ans devrait s'appliquer expressément à tous les recours pour violation d'une obligation foncière, y compris les recours en equity.

(3) (a) Le droit d'action découlant de la violation d'une obligation foncière devrait prendre naissance au moment où la violation se produit.

(b) Sous réserve des règles législatives qui régissent normalement le report, la suspension ou la prorogation des délais de prescription dans certaines circonstances, et sous réserve de l'alinéa c) ci-après, le délai de prescription relatif au droit d'action pour violation d'une obligation foncière devrait se calculer à partir du moment où le droit d'action a pris naissance.

(c) Lorsque la violation se poursuit, le délai devrait se calculer à partir du moment où la violation a cessé.

IDENTIFICATION DES PERSONNES RESPONSABLES

42. (1) Quiconque a le droit de faire exécuter une obligation foncière devrait pouvoir signifier un avis à ceux qui occupent le fonds servant en totalité ou en partie, ou à ceux qui possèdent ou semble posséder un intérêt sur la totalité ou sur une partie du fonds servant.

(2) La personne qui reçoit signification d'un avis devrait être tenue d'y répondre par écrit dans un délai d'un mois à compter de la date de signification, en précisant dans la réponse la nature du domaine ou de l'intérêt qu'elle possède relativement à la totalité ou à une partie du fonds servant, ainsi que les nom et adresse de toute autre

personne qui, à son avis, possède un domaine ou un intérêt sur la totalité ou une partie du fonds servant.

EXTINCTION ET MODIFICATION

Extinction par confusion

43. Il y aurait lieu de prévoir l'extinction d'une obligation foncière lorsque les mêmes droits de propriété du fonds servant et du fonds dominant sont réunis entre les mains d'une seule personne et que personne d'autre ne détient le fardeau ou le bénéfice de l'obligation.

44. Lorsque la propriété d'une partie seulement du fonds dominant et la propriété d'une partie ou de la totalité du fonds servant est réunie entre les mains d'une seule personne, il n'y aurait pas lieu de mettre fin à l'obligation foncière.

45. Lorsque la propriété du fonds dominant et d'une partie seulement du fonds servant est réunie en une seule personne:

    (a) il y aurait lieu de mettre fin aux obligations restrictives et d'accès dans le mesure où elles visent la partie du fonds servant dont la propriété a fusionné avec celle du fonds dominant;

    (b) les autres obligations foncières devraient continuer d'exister.

46. L'extinction d'un projet d'aménagement ou de toute obligation foncière connexe ne devrait s'opérer que si les mêmes droits de propriété sur les unités faisant partie du projet sont réunis entre les mains d'une seule personne et que personne d'autre ne détient le fardeau ou le bénéfice d'une obligation foncière découlant du projet.

47. L'extinction d'une obligation foncière ou d'un projet d'aménagement conformément aux autres recommandations ne porte pas atteinte aux droits et responsabilités afférents à celle-ci au moment de l'extinction.

48. Lorsqu'un locataire est assujetti à une obligation foncière ne touchant pas le locateur :

    (a) si le bail est fusionné avec la réversion, l'obligation devrait continuer de s'appliquer au propriétaire du domaine issu de la fusion et de la réversion de la même façon que s'il avait été le constituant de l'obligation;

    (b) si le locateur résout le bail à la suite d'une faute du locataire, l'obligation foncière devrait prendre fin.

Extinction par effet d'une loi sur l'enregistrement

49. Les obligations foncières et les projets d'aménagement devraient s'éteindre d'eux-mêmes après un délai de quarante ans, à moins qu'il n'y ait reconduction. (voir la recommandation 50)

50. (1) Il devrait être possible de reconduire à l'occasion une obligation foncière ou un projet d'aménagement.

(2) La *Loi sur l'enregistrement des droits immobiliers* devrait être modifiée afin de permettre la reconduction d'une obligation foncière ou d'un projet d'aménagement enregistrés sous le régime de cette loi.

Extinction et modification par les parties

51. Lorsqu'un certain nombre des personnes détenant le fardeau ou le bénéfice d'une obligation foncière s'entendent par écrit pour la modifier, la modification enregistrée sur le titre devrait lier non seulement les parties à la modification, mais également leurs successeurs et les possesseurs adversatifs de la totalité ou d'une partie du bien-fonds.

Extinction et modification par le tribunal

52. Le tribunal devrait avoir compétence pour mettre fin à une obligation foncière ou pour la modifier (y compris une obligation foncière découlant d'un projet d'aménagement) ainsi que pour mettre fin à un projet d'aménagement ou pour le modifier.

53. (1) Quiconque possède un intérêt sur un fonds servant, y compris l'acquéreur éventuel en vertu d'une promesse d'achat et le titulaire d'une option, devrait avoir le droit de s'adresser au tribunal pour obtenir une ordonnance visant à mettre fin à une obligation foncière ou à un projet d'aménagement ainsi qu'à les modifier.

(2) Quiconque possède un intérêt sur un fonds servant et est assujetti à une obligation de paiement réciproque devrait pouvoir demander l'extinction ou la modification non seulement de l'obligation de paiement réciproque même, mais également de toute obligation connexe de fournir des services ou d'effectuer des travaux.

54. (1) Le tribunal devrait avoir compétence pour ordonner l'extinction ou la modification d'un projet d'aménagement ou d'une obligation foncière découlant ou non du projet d'aménagement, selon les modalités qu'il estime appropriées.

(2) La compétence visée à l'alinéa (1) ci-dessus, devrait permettre

également l'imposition d'une obligation nouvelle ou supplémentaire à toute personne, à condition que la personne en cause en accepte le fardeau.

(3) Sous réserve de l'alinéa (4) ci-dessous, lorsque le tribunal est saisi d'une demande en vue d'obtenir une ordonnance d'extinction ou de modification d'un projet d'aménagement ou d'une obligation foncière connexe, le tribunal devrait pouvoir faire exception à la nécessité d'obtenir le consentement individuel visé à l'alinéa (2) dans l'intérêt du projet d'aménagement dans son ensemble, si ce consentement est refusé pour des motifs déraisonnables ou si la personne de qui on cherche à l'obtenir est un incapable ou est introuvable ou encore si cette personne n'avait pas eu des motifs raisonnables de refuser ce consentement.

(4) Le tribunal devrait pouvoir faire exception à la nécessité d'obtenir le consentement conformément à l'alinéa (3) ci-dessus, à condition de s'assurer que le préjudice éventuellement subi par la personne dont le consentement est écarté ne dépasserait pas sensiblement en importance l'avantage que pourrait lui procurer l'ordonnance.

(5) Comme condition d'extinction ou de modification d'une obligation foncière, le tribunal devrait avoir compétence pour ordonner au requérant de verser une somme à la personne assujettie à l'ordonnance à titre d'indemnité pour le préjudice ou pour l'inconvénient que l'ordonnance occasionne à cette personne.

(6) Le tribunal devrait avoir compétence pour donner des directives en ce qui concerne la communication d'un avis aux personnes visées par l'ordonnance.

55. (1) Une ordonnance du tribunal visant l'extinction ou la modification d'une obligation foncière devrait s'appliquer à quiconque détient présentement ou subséquemment le fardeau ou le bénéfice de l'obligation.

(2) Une ordonnance du tribunal visant l'extinction ou la modification d'un projet d'aménagement devrait s'appliquer à quiconque est présentement ou subséquemment lié à ce projet.

(3) Une ordonnance ayant pour effet d'imposer des obligations foncières nouvelles devrait préciser les personnes visées.

(4) Une ordonnance du tribunal visant l'extinction ou la modification d'une obligation foncière ou d'un projet d'aménagement devrait être enregistrée sur le titre du bien-fonds visé.

56. Le tribunal devrait avoir compétence pour ordonner l'extinction ou la

modification d'une obligation foncière ou d'un projet d'aménagement pour l'un ou plusieurs des motifs suivants :

(a) l'obligation foncière n'a plus sa raison d'être par suite de l'évolution des caractéristiques du fonds servant ou du voisinage;

(b) le changement n'est pas préjudiciable aux titulaires du bénéfice de l'obligation;

(c) les titulaires du bénéfice de l'obligation ont l'âge et la qualité nécessaires et ont consenti expressément ou tacitement aux changements proposés;

(d) le changement proposé aurait pour effet d'éliminer un facteur préjudiciable à la réalisation générale d'un projet d'aménagement, et

(i) est profitable à l'égard d'une partie ou de la totalité du bien-fonds visé par le projet,

(ii) le préjudice occasionné à toute personne assujettie par une obligation foncière découlant du projet ne dépasse pas sensiblement en importance les avantages que le changement lui procurerait,

(e) l'obligation foncière ne prévoit pas le paiement d'une somme d'argent et

(i) nuit à une affectation raisonnable du bien-fonds ou y nuirait à moins d'être modifiée,

(ii) ne procure aucun avantage tangible aux titulaires du bénéfice de l'obligation, et

(iii) il y a moyen de dédommager adéquatement les titulaires du bénéfice pour le préjudice ou l'inconvénient subi;

(f) dans le cas d'une obligation positive, les circonstances ont évolué au point où l'obligation:

(i) soit a perdu toute utilité raisonnable,

(ii) soit entraîne des dépenses démesurées par rapport aux avantages qu'elle procure;

(g) dans le cas d'un projet d'aménagement ou de toute stipulation connexe, les circonstances ont évolué au point où le projet ou la stipulation :

(i) soit ont perdu leur raison d'être,

(ii) soit n'ont plus d'utilité raisonnable,

(iii) soit entraînent des dépenses démesurées par rapport aux avantages qu'ils procurent;

(h) dans le cas d'une obligation foncière indépendante, le titulaire du bénéfice ne retire aucun avantage tangible de l'obligation;

(i) le changement s'impose en raison d'une ordonnance rendue par le tribunal pour l'un des autres motifs.

57. En cherchant à déterminer s'il a lieu d'ordonner l'extinction ou la modification, pour l'un des motifs précités, d'une obligation foncière donnée qui ne prévoit pas le versement d'une somme d'argent, ou en cherchant à décider si une obligation foncière nuit à une affectation raisonnable du bien-fonds, conformément à la recommandation 56(e) ci-dessus, le tribunal devrait tenir compte des questions locales d'aménagement du territoire.

Droits et responsabilités afférents à une obligation

58. Sous réserve du pouvoir du tribunal de rendre une ordonnance visant l'extinction ou la modification d'un projet d'aménagement ou d'une obligation foncière selon les modalités qu'il estime appropriées (voir la recommandation 54(1)), l'extinction ou la modification d'une obligation foncière ou d'un projet d'aménagement ne porte pas atteinte aux droits et responsabilités y afférents au moment de l'extinction ou de la modification.

POUVOIRS SUPPLÉMENTAIRES DU TRIBUNAL

59. Le tribunal devrait avoir compétence pour déclarer, sur présentation d'une requête en ce sens :

(a) si un bien-fonds est effectivement visé ou pourrait être visé dans certaines circonstances par une obligation foncière ou par un projet d'aménagement;

(b) la nature et la portée de l'obligation foncière, le caractère exécutoire de celle-ci ainsi que l'identité des personnes pouvant la faire exécuter.

TRIBUNAUX COMPÉTENTS

60. (1) Un juge de la Cour suprême ou un juge de la Cour de district du comté ou du district où est situé le bien-fonds assujetti à une

obligation foncière ou à un projet d'aménagement, devrait avoir compétence pour connaître d'une requête en extinction ou en modification ainsi que pour exercer les pouvoirs déclaratoires visés par la recommandation 59.

(2) Le droit d'évoquer un litige en Cour suprême et le droit d'interjeter appel à la Cour divisionnaire devraient être conservés.

EXPROPRIATIONS

61. La *Loi sur l'expropriation* devrait être modifiée de façon à prévoir ce qui suit :

(a) lorsque l'expropriant acquiert un bien-fonds constituant le fonds dominant visé par une obligation foncière, le bénéfice de l'obligation lui revient du fait même;

(b) lorsque l'expropriant acquiert un bien-fonds constituant le fonds servant visé par une obligation foncière donnée, l'obligation prend fin dans la mesure seulement où l'affectation du bien exproprié envisagée par l'expropriant est incompatible avec l'obligation foncière;

(c) lorsque l'expropriant acquiert un fonds servant à titre temporaire, l'obligation foncière est suspendue pour la durée de l'expropriation;

(d) les mêmes règles s'appliquent lorsque l'expropriant acquiert une partie d'un projet d'aménagement;

(e) lorsque l'expropriant acquiert un bien-fonds constituant le fonds servant visé par une obligation foncière, le propriétaire du fonds dominant a droit à un dédommagement si l'expropriation a un effet préjudiciable sur son bien;

(f) les règles susvisées s'appliquent tant dans le cas d'un bien-fonds exproprié que dans celui d'un bien-fonds acquis par un accord mutuel des parties tel que prévu par la loi.

MODIFICATIONS CORRÉLATIVES AU DROIT ACTUEL

Maintien du droit relatif aux engagements

62. (1) Sous réserve des exceptions visées à l'alinéa (2) ci-dessous, le droit actuel relatif au fardeau et au bénéfice d'engagements visant un bien-fonds devraient continuer à s'appliquer aux engagements positifs et restrictifs actuels visant les bien-fonds en tenure franche

mais non aux obligations foncières constituées après la mise en oeuvre des présentes recommandations.

(2) Les recommandations visées à l'alinéa (1) ne devraient pas s'appliquer aux situations suivantes :

(a) les engagements quant à la qualité du titre qui sont prévus implicitement par l'article 5 de la *Loi de 1984 portant réforme de l'enregistrement immobilier*;

(b) les engagements relatifs aux biens à bail;

(c) la doctrine énoncée dans *Halsall c. Brizell*;

(d) les engagements restrictifs qui sont constitués après la date de mise en oeuvre de nos recommandations en vertu d'une obligation ou d'un droit de contracter un engagement établis avant cette date.

Modifications législatives

63. (1) La *Loi de 1984 portant réforme de l'enregistrement immobilier*, la Partie III de la *Loi sur l'enregistrement des actes*, l'article 9(5) de la *Loi de 1984 sur les ventes pour impôts municipaux* ainsi que l'article 22 de la *Loi sur les actes translatifs de propriété* devraient être modifiés afin de prévoir expressément les obligations foncières.

(2) Les différents ministères du gouvernement de l'Ontario devraient passer en revue les lois dont l'application leur incombe afin de déterminer si la mise en oeuvre du régime des obligations foncières nécessite d'autres modifications corrélatives.

APPLICATION À LA COURONNE

64. Le régime d'obligations foncières et de projets d'aménagement proposé devrait s'appliquer également à la Couronne du chef de l'Ontario et, dans les limites permises par la constitution, à la Couronne du chef du Canada.

AUTRES MODIFICATIONS AU DROIT ACTUEL

65. La *Loi sur les actes translatifs de propriété* devrait être modifiée comme suit :

(a) ajouter une disposition ayant des effets analogues à l'article 56 de la *Law of Property Act 1925* d'Angleterre;

(b) remplacer l'article 24 par une disposition ayant des effets analogues à l'article 78 de la *Law of Property Act 1925* d'Angleterre;

(c) ajouter une disposition ayant des effets analogues à l'article 79 de la *Law of Property Act 1925* d'Angleterre;

(d) ajouter des dispositions ayant des effets analogues aux articles 80, 82 et 83 de la *Law of Property Act 1925 d'Angleterre*;

(e) ajouter une disposition analogue à l'article 117 de la *Land Law and Conveyancing Act, 1981*, de Trinité et Tobago.

REPORT

ON

COVENANTS AFFECTING FREEHOLD LAND

ONTARIO LAW REFORM COMMISSION

Ministry of the
Attorney
General

1989

89-06247/

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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The Commission's office is located on the Eleventh Floor at 720 Bay Street, Toronto, Ontario, Canada, M5G 2K1.

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Ontario
Law Reform
Commission

The Honourable Ian G. Scott, QC
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on Covenants Affecting Freehold Land*.

CHAPTER 1

INTRODUCTION

1. GENERAL

Most home owners in Ontario would likely be surprised to learn that, if they agree with their neighbour, for example, that the neighbour and her successors in title will maintain a common boundary fence, or a common driveway, the obligation will not bind subsequent owners of the neighbour's property. Similarly, where the owners in a property development undertake an obligation that they and their successors in title will pay for the maintenance of amenities provided in the development, the obligation will not bind subsequent owners.

Moreover, the neighbour, in the first example, and the original owners, in the second, might be even more surprised to learn that they will remain liable for contraventions of the obligation, even after they have disposed of their property. Thus, not only is the obligation not enforceable against someone who should be liable, but it is enforceable against someone who should not.[1]

Other situations also arise that, in our view, are equally anomalous. For instance, where a landowner agrees with a homeowners' association that neither she nor her successors in title will use her property for a particular purpose, the homeowners' association will be unable to enforce the agreement against a subsequent owner of the property, unless the association owns a parcel of land that can be regarded as being benefited by the covenant.[2]

These are but a few illustrations of the generally unsatisfactory state of the law of covenants related to land. Indeed, it has long been acknowledged that the law of covenants is unsatisfactory in a variety of respects. In our view, it is unnecessarily complex and occasionally illogical, but, perhaps most importantly, it has failed to accommodate the legitimate expectations

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[1] England, The Law Commission, *Transfer of Land*[:] *The Law of Positive and Restrictive Covenants*, Law Com. No. 127 (1984) (hereinafter referred to as "English Report"), para. 4.3, at 28.

[2] See *Re British United Automobiles Ltd. and Volvo Canada Ltd.* (1980), 29 O.R. (2d) 725, 114 D.L.R. (3d) 488 (H.C.J.). See, also, *R. v. York Twp., Ex Parte 125 Varsity Rd. Ltd.*, [1960] O.R. 238, 23 D.L.R. (2d) 465 (C.A.) and the discussion *infra*, ch. 2, sec. 5(b)(ii).

of the parties. It is not surprising, therefore, that, in recent years, the law of covenants has been the subject of reform proposals in a number of jurisdictions.[3]

2. ORIGIN AND CONDUCT OF THE PROJECT

Originally, the subject matter of this project was intended for inclusion in the Commission's more broadly focused Project on Basic Principles of Land Law. For that purpose, a comprehensive research paper was prepared by Professor A.H. Oosterhoff, of the Faculty of Law, University of Western Ontario. After a review of the substantial work prepared by Professor Oosterhoff, and after making our recommendations, the decision was taken to complete and publish a separate *Report on Covenants Affecting Freehold Land*.

We wish to express our appreciation to Professor Oosterhoff, both for his initial contribution and for his continued efforts during the course of this project.

3. THE PROBLEM STATED

Technically, a covenant is a promise contained in a deed, that is, a document under seal.[4] As such, in accordance with ordinary contract principles, it is enforceable only between the parties to it or, since early in the common law,[5] their personal representatives. In contract, therefore, covenants relating to land would not be enforceable by or against a transferee of the land once the property had been disposed of by the original contracting party. While existing neighbours might enter into a covenant affecting their adjoining properties, such covenants are ordinarily entered into as part of a transaction in land. For instance, where a person agrees to sell part of her property, in order to enhance the value of the land retained, the vendor might require the purchaser to covenant not to use the property acquired for certain purposes. If the purchaser subsequently sells the land acquired, or the vendor sells the land retained, the law of contract would not permit the enforcement of the covenant by or against the transferee. In limited circumstances, however, the law of property supplements the law of

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[3] See, for example, the English Report, *supra*, note 1, and the reports listed, *infra*, this ch., sec. 3. See, also, Law Reform Commission of Victoria, *Easements and Covenants*, Discussion Paper No. 15 (1989).

[4] While this is the technical meaning of the term "covenant", we shall use the term whether or not the promise is contained in a deed. It should also be noted that recent Ontario legislation has removed the need for executing conveyancing documents under seal. Section 13(1) of the *Land Registration Reform Act, 1984*, S.O. 1984, c. 32, provides that "[d]espite any statute or rule of law, a transfer or other document transferring an interest in land...need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal".

[5] Holdsworth, *A History of English Law*, Vol. III (5th ed., 1942, Rep. 1966), at 451-52, 576-79 and 584.

contract and provides for the enforceability of such covenants, notwithstanding the absence of privity of contract. For example, under appropriate conditions, a restrictive covenant will pass with freehold land so as to be enforceable between successive owners.[6] Similarly, certain leasehold covenants, such as a covenant to pay rent or to repair, will remain enforceable by or against a transferee when the lessor sells the reversion or the lessee assigns the lease.[7]

On the other hand, although the benefit of a positive covenant is enforceable by a successor of the original covenantee, it is enforceable against only the original covenantor and her personal representative.[8] With few exceptions, the burden of a positive covenant is not enforceable against a successor of the original covenantor.[9] Thus, while the benefit of a positive covenant may be said to run with the land at law, the burden of a positive covenant ordinarily does not do so. One important exception to this rule involves obligations imposed under condominium legislation. Thus, certain positive covenants are enforceable between successive owners of condominium units by virtue of specific enabling legislation.[10] Moreover, the burden of positive covenants remain enforceable in the context of leaseholds.

In our view, therefore, the main problem is the illogical nature of a rule that prohibits the running of the burden of positive covenants in freehold land, while permitting not only the running of the benefit of positive covenants in freehold land, but also the running of both the benefit and the burden of restrictive covenants in freehold land, as well as both the benefit and the burden of positive and restrictive covenants contained in leases.

In addition, while equity permits both the benefit and the burden of restrictive covenants to run with freehold land, the law in this respect is unduly complex and productive of much uncertainty. The burden of restrictive covenants, which cannot run at law, is permitted to run in equity only according to complex rules. Further, although the benefit of restrictive covenants is permitted to run both at law and in equity, the legal rules differ substantially from the equitable rules. Moreover, the equitable rules respecting the running of the benefit are as complex as those respecting the running of the burden.[11]

These problems have been recognized for many years and a number of reports have been produced in England to consider them. The first of these

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[6] A restrictive covenant is one that prevents a person from doing something on her land. Restrictive covenants in freehold land are discussed *infra*, ch. 2, sec. 5.

[7] Leasehold covenants are discussed *infra*, ch. 2, sec. 3.

[8] A positive covenant is one that requires a person to do something on her land. Positive covenants in freehold land are discussed *infra*, ch. 2, sec. 4.

[9] As will be explained below, the benefit of a covenant is the right to bring an action to enforce it, while the burden is the liability to be sued upon it.

[10] As to the rights and obligations of owners and occupiers, see the *Condominium Act*, R.S.O. 1980, c. 84, s. 31.

[11] See English Report, *supra*, note 1, para. 4.9, at 29.

was the *Report of the Committee on Positive Covenants Affecting Land*.[12] It was followed by the Law Commission's *Report on Restrictive Covenants*[13] and its Working Paper on rights appurtenant to land.[14] The Law Commission then produced its final report on these matters, entitled *Transfer of Land*[:] *The Law of Positive and Restrictive Covenants*.[15] It is sufficient at this point simply to note that the Law Commission, in its final report, recommended that positive covenants be made enforceable against successors of the covenantor, that is, that the burden of positive covenants be allowed to run with the land, and that the law of restrictive covenants be reformed.

Moreover, the New Zealand Property Law and Equity Reform Committee, in its 1985 *Report on Positive Covenants Affecting Land*,[16] reached the conclusion that positive covenants should be enforceable by and against successors in title, although it took a somewhat different approach from that recommended in the United Kingdom.

4. THE NATURE AND ORGANIZATION OF THE REPORT

The purpose of this Report is twofold. We shall examine whether, and to what extent, the burden of positive covenants affecting land should be made enforceable against successors of the covenantor. We shall also examine the Ontario law of restrictive covenants generally to ascertain whether, and to what extent, it requires reform.

This Report is concerned solely with covenants respecting freehold land. We shall not deal with reform of the law of leasehold covenants. However, the former are not readily comprehensible without an understanding of the latter. Hence, the next chapter includes an outline of the law of leasehold covenants.

The present Ontario law of covenants will be considered in chapter 2. Chapter 3 examines the various approaches to reform, either proposed or adopted, in England, Trinidad and Tobago, New Zealand, and the United States, as well as a brief discussion of the American law of covenants. Finally, in chapter 4, the Commission's conclusions and recommendations are set out following an evaluation of both the existing law and the several approaches to reform.

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[12] United Kingdom, *Report of the Committee on Positive Covenants Affecting Land* (Cmnd. 2719, 1965).

[13] England, The Law Commission, *Transfer of Land*[:] *Report on Restrictive Covenants*, Law Com. No. 11 (1967).

[14] England, The Law Commission, *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971).

[15] English Report, *supra*, note 1.

[16] New Zealand, Property Law and Equity Reform Committee, *Report on Positive Covenants Affecting Land* (1985).

CHAPTER 2

THE PRESENT LAW OF COVENANTS

1. INTRODUCTION

As noted above,[1] covenants relating to land are governed by both the law of contract and the law of property. The particular focus of this Report is the degree to which the law of property permits the enforcement of such covenants, beyond that permitted by the law of contract. To the extent that covenants affecting land are enforceable in contract, the ordinary rules of contract apply. Although these are well known, we shall outline them briefly below, since they remain relevant in the context of real property.

It is also necessary to consider the law respecting leasehold covenants. While this Report is not concerned with the reform of such covenants, the law of freehold covenants is based, in part, on the principles respecting leasehold covenants. Moreover, a knowledge of leasehold covenants is essential to an understanding of the most serious deficiency in the current law of freehold covenants, namely, the fact that the burden of a positive covenant is not enforceable against a transferee of freehold land from the original covenantor.

This chapter begins, therefore, with an outline of the general principles of covenants.[2] The law of leasehold covenants is then considered, followed by a discussion of positive and restrictive covenants running with freehold land at law. In the last part of this chapter we consider covenants running with freehold land in equity, that is, restrictive covenants.

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[1] *Supra*, ch. 1, sec. 3.

[2] In the writing of this chapter reference was had, *inter alia*, to the following materials: Megarry and Wade, *The Law of Real Property* (5th ed., 1984), ch. 14; Oosterhoff and Rayner, *Anger and Honsberger*[:] *Law of Real Property* (2d ed., 1985) (hereinafter referred to as "Anger and Honsberger"), Vol. 1, ch. 8 and Vol. 2, ch. 17; Newsom, *Preston & Newsom's Restrictive Covenants Affecting Freehold Land* (7th ed., 1982) (hereinafter referred to as "Preston and Newsom"); Burn, *Cheshire and Burn's Modern Law of Real Property* (14th ed., 1988) (hereinafter referred to as "Cheshire and Burn"), chs. 17 and 20; Bentley, McNair and Butkus (eds.), *Williams & Rhodes*[:] *Canadian Law of Landlord and Tenant* (6th ed., 1988), §§15:6-15:7:2, at 15-64 to 15-84; Smout, "Easements and Restrictive Covenants", in *Special Lectures of the Law Society of Upper Canada 1951*[:] *Conveyancing and Real Property* (1951) 105; and England, The Law Commission, *Transfer of Land*[:] *The Law of Positive and Restrictive Covenants*, Law Com. No. 127 (1984) (hereinafter referred to as "English Report"), Part III.

2. GENERAL PRINCIPLES OF COVENANTS

Historically, a covenant bound only the parties to it. At a relatively early date, however, it was determined that an action for breach of the contract (then an action in *assumpsit*) could be transmitted to the personal representatives of the parties upon their deaths.[3] The right of action could also be released,[4] but it was not generally assignable at common law, because that was thought to encourage maintenance.[5] Although choses in action did later become assignable, in part, in equity,[6] and although they are now generally assignable by statute,[7] it does not follow that covenants are capable of running with land when it is transferred. In this context, the law has developed peculiar and complex rules.

Since covenants relating to land involve both contract law and land law, the principles of both must be considered throughout our discussion of covenants. The two leading principles emerging from these areas are privity of contract and privity of estate. Privity of contract means simply that the parties stand in direct contractual relation to each other and may enforce their rights under the law of contract. Privity of estate, on the other hand, connotes a relationship of tenure between the parties. In modern law, disregarding the relationship between the Crown and subject, a tenurial relationship exists only between lessor and lessee.[8]

Functionally, three basic situations may be identified in connection with these principles. The first is a situation in which privity of contract exists between the parties. The second is one in which privity of estate, but not privity of contract, exists between the parties. The third is a situation in

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[3] *Pinchon's Case* (1610), 9 Co. Rep. 86b, 77 E.R. 859. See, also, Holdsworth, *A History of English Law*, Vol. III (5th ed., 1942, Rep. 1966), at 451-52, 576-79 and 584.

[4] Litt. §§508 and 512, and Co. Litt. 291b and 292a.

[5] Holdsworth, *supra*, note 3, Vol. VII (2d ed., 1937, Rep. 1966), at 534-35.

[6] *Ibid.*, at 535-36.

[7] See *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s. 53.

[8] At common law, the relationship between landlord and tenant is one of tenure, since the tenant holds an estate of the lord. In order to create such a relationship, it is necessary that the landlord retain a reversionary estate during the term of the lease. In Ontario, however, it would appear that the relationship can be validly created notwithstanding the fact that the landlord does not retain a reversion. Section 3 of the *Landlord and Tenant Act*, R.S.O. 1980, c. 232 provides as follows:

> 3. The relation of landlord and tenant does not depend on tenure, and a reversion in the lessor is not necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor is it necessary, in order to give a landlord the right of distress, that there is an agreement for that purpose between the parties.

In our *Report on Landlord and Tenant Law*, the Commission considered this section, and concluded that it ought not to recommend "the outright repeal of section 3 and the wholesale endorsement of a purely, and exclusively, contractual landlord and tenant relationship": see Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) (hereinafter referred to as "Landlord and Tenant Report"), at 6-7.

which neither privity of contract nor privity of estate exists between the parties. The fundamental rules, applicable in each of these circumstances, will be discussed in turn.[9]

Privity of contract exists between a lessor and a lessee, the original parties to the lease, and between a vendor and a purchaser upon a transfer of freehold land. If privity of contract exists, the parties to the contract and, as we have indicated,[10] their personal representatives, can bring action against each other to enforce the contract. An action lies either at law for damages for breach of the contract, or sometimes in equity for an injunction or specific performance. It should be noted that the benefit of the contract, that is, the right to sue upon it, is assignable, but the burden, that is, the liability under it, is not.[11]

Privity of estate (as well as privity of contract) exists between a lessor and a lessee, because their relationship is based on tenure.[12] Moreover, if the lessor assigns the reversion, or the lessee assigns the term of the lease, privity of estate will exist between the following: (1) an assignee of the lessor and the original lessee; (2) an assignee of the lessee and the original lessor; and (3) an assignee of the lessor and an assignee of the lessee. As we noted above, privity of estate exists only between lessor and lessee (and their respective assignees). Privity of estate does not exist, therefore, between the lessor and a sublessee, since no direct lessor-lessee relationship exists between them. Nor does privity of estate exist in the context of freehold land.

If privity of estate exists, but privity of contract does not, an assignee of the term or of the reversion may enforce only those covenants that "touch and concern", or relate to the subject-matter of, the lease. As we discuss below,[13] these are covenants that concern the relationship of lessor and lessee. Covenants that do not touch and concern the land are not enforceable by the assignees of the original parties. It must be remembered, however, that such covenants would be enforceable by the original parties themselves.

Since privity of contract continues notwithstanding an assignment of the lease or the reversion, the original parties remain liable to each other for breaches of covenant during the entire term of the lease. On the other hand, since privity of estate continues only so long as the relationship of tenure exists, an assignee of the term or of the reversion is liable only for breaches of covenants that occur while she holds the estate in the land.[14]

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[9] Where both privity of contract and privity of estate exist between the parties, the covenant may be enforced under either the law of contract or the law of property.

[10] *Supra*, this sec.

[11] Megarry and Wade, *supra*, note 2, at 740.

[12] See *supra*, note 8, and accompanying text.

[13] See *infra*, this ch., sec. 3(b)(ii)c.

[14] *Chancellor v. Poole* (1781), 2 Doug. K.B. 764, 99 E.R. 488.

Neither privity of estate nor privity of contract exists, in the leasehold context, between a lessor and a sublessee, that is, a person to whom the lessee has sublet part of the term, rather than one to whom he has assigned the remainder of the term. In the freehold context, where the vendor of freehold land has retained adjoining or other land, there is neither privity of contract nor privity of estate between the following: (1) the vendor and the purchaser's assignee; (2) the vendor's assignee and the purchaser; or (3) the vendor's assignee and the purchaser's assignee.[15]

If there is neither privity of contract nor privity of estate between the parties, a covenant is not enforceable, subject to two exceptions. First, in equity, the benefit and the burden of a restrictive covenant, that is, a covenant that is negative in substance, can run with the land.[16] Secondly, at law, the benefit, although not the burden, of a positive or restrictive covenant that touches and concerns the land can run with an estate in the land.[17] Moreover, the benefit of any covenant, whether or not it touches or concerns the land, can be assigned in equity or, more recently, at law by virtue of statute.[18] By contrast, in Ontario, the burden of a covenant cannot be assigned, either at law, in equity or by statute.

We now turn to consider, in somewhat more detail, the law of leasehold covenants, covenants running at law on the transfer of freehold land and the law of restrictive covenants.

3. COVENANTS IN LEASES

(a) The Position of Lessor and Lessee

As between lessor and lessee, the original parties to the lease, there is both privity of contract and privity of estate. Thus, upon an application of ordinary contract principles, both parties to the lease will remain liable on their covenants, for the term of the lease, notwithstanding that the lessee has assigned the term,[19] or the lessor has assigned the reversion.[20] In either case, contractual liability will continue for the term of the lease, even though the assignee may also be liable on the covenant by reason of privity of estate. In such a case, the original contracting party has the option of bringing an

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[15] The term "assignee" is used throughout this Report to refer to an assignee of the entire interest in land of the assignor.

[16] For example, a covenant prohibiting the use of property for commercial purposes. Covenants running with freehold land in equity are discussed *infra*, this ch., sec. 5.

[17] Covenants running with freehold land at law are discussed *infra*, this ch., sec. 4.

[18] See *supra*, note 7.

[19] *John Betts and Sons, Ltd. v. Price* (1924), 40 T.L.R. 589 (K.B. Div.).

[20] *Stuart v. Joy*, [1904] 1 K.B. 362 (C.A.).

action against the other original party to the contract or the assignee, although recovery may only be obtained from one of them.[21]

If the lease is renewed by the lessee's assignee pursuant to an option to renew, the original lessee's liability ceases, since the renewal term involves a new contract; but it is otherwise if the original lease is merely extended in accordance with its terms.[22]

(b) The Position of Assignees

(i) Introduction

Whether the lessee assigns the term of the lease, or the lessor assigns the reversion, the question for determination in each case is whether the assignee is subject to the burden, or entitled to the benefit, of the covenants contained in the lease. As we discuss below, however, the rules governing these two situations are derived from different sources. In effect, there are two separate rules, one respecting the running of covenants with the term, and the other respecting the running of covenants with the reversion.[23] While these rules differ substantially, two elements are common to both. They both depend upon the existence of privity of estate, and upon whether the covenant in question "touches and concerns" the land. Privity of estate has been discussed above.[24] The "touch and concern" requirement is discussed later in this chapter.[25] We turn first, therefore, to consider the rules under which covenants run with the lease and the reversion.

(ii) The Running of Leasehold Covenants

a. The Running of Covenants with the Term of the Lease

Where the lessee assigns the term of the lease, the benefit of the lessor's covenants and the burden of the lessee's covenants run with the lease under the rule in *Spencer's Case*.[26] The principles established in that case are summarized below.

Where there is privity of estate, covenants that "touch and concern" the estate in the land or something *in esse*—that is, in existence or actually on

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[21] *Brett v. Cumberland* (1619), Cro. Jac. 521, 79 E.R. 446 (K.B. Div.).

[22] *Baker v. Merckel*, [1960] 1 Q.B. 657, [1960] 1 All E.R. 668 (C.A.).

[23] It has been determined that the covenant does not run with the land itself. Rather, it runs with the estate in the land, that is, the leasehold interest or the reversion expectant thereon. See Holdsworth, *supra*, note 3, Vol. VII (2d ed., 1937, Rep. 1966), at 290-91.

[24] *Supra*, this ch., sec. 2.

[25] *Infra*, this ch., sec. 3(b)(ii)c.

[26] (1583), 5 Co. Rep. 16a, 77 E.R. 72.

the land—may be enforced either by or against the assignee, whether or not "assignees" are named expressly in the lease. However, covenants that relate to something *in posse*—that is, something that remains to be done on or for the benefit of the land, or not in existence at the time of the demise—will run with the estate only if the original lessee covenanted expressly on behalf of himself and his assigns. On the other hand, covenants that do not touch and concern the land—that is, those that are merely personal or collateral—do not run with the land even if the assigns are named.[27]

Although there would appear to be no intelligible basis for distinguishing between covenants relating to things in being and things not yet in existence,[28] the distinction remains in Ontario for commercial leases. It has been abolished in Ontario for residential tenancies[29] and it has been abolished in England for all leases made after 1925.[30] It should be noted, however, that if a lease is made pursuant to the *Short Forms of Leases Act*[31] the words "lessor" and "lessee" include their heirs, executors, administrators, successors and assigns.[32]

The rules respecting the running of covenants with the lease applied only to leases made by deed. If the covenants were not made under seal,[33] they could not be annexed to the estate.[34] In equity, however, under the rule in *Walsh v. Lonsdale*,[35] the benefit of a covenant, although not the burden, may be assigned so as to run with the term of a specifically enforceable agreement for lease, even though it is not under seal.[36] Since only the

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[27] *Mayor of Congleton v. Pattison* (1808), 10 East. 130, 103 E.R. 725 (K.B.). It should be noted, however, that the benefit of such covenants may be assigned expressly. See *Lamvid Inc. v. 427654 Ontario Ltd.* (1985), 50 O.R. (2d) 782, 40 R.P.R. 50 (H.C.J.).

[28] *Minshull v. Oakes* (1858), 2 H. & N. 793, 157 E.R. 327 (Ex.).

[29] Section 90 of the *Landlord and Tenant Act*, *supra*, note 8, provides as follows:

> 90. Covenants concerning things related to the rented premises run with the land whether or not the things are in existence at the time of the demise.

In our Landlord and Tenant Report, the Commission recommended that, to the extent that the *in posse* rule continues with respect to commercial tenancies, it should be abolished. See *supra*, note 8, at 31.

[30] *Law of Property Act 1925*, 15 & 16 Geo. 5, c. 20 (U.K.), s. 79.

[31] R.S.O. 1980, c. 473.

[32] *Ibid.*, s. 2(5).

[33] As noted above, *supra*, ch. 1, note 4, while the term "covenant" technically refers to a promise under seal, we use the term whether or not the promise is contained in a deed.

[34] *Elliott v. Johnson* (1866), L.R. 2 Q.B. 120, at 127, 36 L.J.Q.B. (N.S.) 44.

[35] (1882), 21 Ch. D. 9, 52 L.J. Ch. (N.S.) 2 (C.A.). Since equity treats as done that which ought to be done, equity would treat the parties to a specifically enforceable agreement for lease as if they had entered into a lease and had attended to all requisite formalities.

[36] *Purchase v. Lichfield Brewery Co.*, [1915] 1 K.B. 184, (1914), 84 L.J.K.B. (N.S.) 742, and *Rogers v. National Drug and Chemical Co.* (1911), 23 O.L.R. 234 (H.C.J.), aff'd 24 O.L.R. 486 (C.A.).

benefit, and not the burden, of covenants will run with the term in these circumstances, the assignee may sue the lessor to enforce her covenants, but the lessor cannot sue the assignee to enforce the lessee's covenants. This, of course, is consistent with the notion that, while the benefit of an agreement may be assigned, the burden may not. In England, however, it has been held that the burden of a covenant would run with the term of a lease in writing, although it was not under seal;[37] and further, it has been suggested that it would also run with the term of an oral lease.[38] Moreover, if, after an assignment of a lease not under seal, the assignee goes into possession and pays rent to the lessor, it may be inferred that an agreement to continue the lease on the same terms exists.[39] The assignee, in such a case, would be bound under the doctrine of privity of contract.

b. The Running of Covenants with the Reversion

At common law, except for obligations inherent in the relationship of lessor and lessee—for example, the lessee's covenant to pay rent—the benefit and burden of covenants did not run with the reversion. This position was altered in 1540 by the *Grantees of Reversions Act*.[40] Therefore, while covenants run with the term under the rule in *Spencer's Case*,[41] they run with the reversion under the provisions first enacted in the *Grantees of Reversions Act*. By section 1 of that Act, the lessor's assignees were given the same rights against the lessee, and her assigns, as the original lessor had with respect to the lessee's covenants contained in the lease. The substance of this provision appears as section 4 of the *Landlord and Tenant Act*.[42]

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[37] *Boyer v. Warbey*, [1953] 1 Q.B. 234, [1953] 1 All E.R. 269 (C.A.) (subsequent reference is to [1953] 1 Q.B.). See, generally, Smith, "The Running of Covenants in Equitable Leases and Equitable Assignments of Legal Leases" (1978), 37 Cambridge L.J. 98.

[38] *Boyer v. Warbey*, *supra*, note 37, at 246, *per* Denning L.J.

[39] *Buckworth v. Simpson* (1835), 1 Cr. M. & R. 834, 149 E.R. 1317 (Ex.); *Cornish v. Stubbs* (1870), L.R. 5 C.P. 334, at 338-39; and *Rogers v. National Drug and Chemical Co.*, *supra*, note 36.

[40] (1540), 32 Hen. 8, c. 34 (U.K.).

[41] *Supra*, note 26.

[42] Section 4 of the *Landlord and Tenant Act*, *supra*, note 8, provides as follows:

> 4. All persons being grantees or assignees of the Queen, or of any person other than the Queen, and the heirs, executors, successors and assigns of every of them, shall have and enjoy like advantage against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture, and also shall have and enjoy all and every such like and the same advantage, benefit, and remedies, by action only, for the non-performance of other conditions, covenants, or agreements, contained and expressed in the indentures of their said leases, demises or grants against all and every of the said lessees and grantees, their executors, administrators, and assigns as the said lessors or grantors themselves, or their heirs or successors, might have had and enjoyed at any time or times.

Similarly, by section 2 of the *Grantees of Reversions Act*,[43] the lessee and her assigns were given the same rights of enforcement against the lessor's assigns as they had against the original lessor. The substance of this provision also appears in the *Landlord and Tenant Act*.[44]

The provisions first enacted in the *Grantees of Reversions Act*[45] apply only to leases made by deed.[46] However, where there is a specifically enforceable agreement to lease, an application of the rule in *Walsh v. Lonsdale*[47] will permit enforcement of the lessor's covenants against an assignee of the reversion, notwithstanding the absence of a deed.[48] Moreover, where the lease is not made by deed and, after assignment, rent is paid by the tenant to the lessor's assignee, an agreement will be inferred to continue the tenancy upon the same terms.[49]

See, also, s. 5 of the *Landlord and Tenant Act*, which provides that the benefit of the lessee's covenants having reference to the subject matter of the lease—that is, those that touch and concern the land—are annexed to and run with the reversion, and s. 6, which provides that an assignee of the reversion may enforce a condition of re-entry or forfeiture for breach of any covenant or condition, even though the assignee became so entitled after the condition of re-entry or forfeiture became enforceable. (Section 5 applies only to leases made after March 24, 1911. See *The Landlord and Tenant Act*, R.S.O. 1914, c. 155, s. 9, unrepealed and unconsolidated.)

[43] *Supra*, note 40.

[44] Section 7 of the *Landlord and Tenant Act*, *supra*, note 8, provides as follows:

> 7. All lessees and grantees of lands, tenements, rents, portions, or any other hereditaments for term of years, life or lives, their executors, administrators, and assigns shall and may have like action, advantage, and remedy against all and every person who shall have any gift or grant of the Queen, or of any other persons, of the reversion of the same lands, tenements and other hereditaments so let, or any parcel thereof, for any condition, covenant, or agreement, contained or expressed in the indentures of their leases as the same lessees or any of them, might and should have had against their said lessors, and grantors, their heirs, or successors.

See, also, s. 8, which provides that the burden of the lessor's covenants having reference to the subject matter of the lease—that is, those that touch and concern the land—are annexed to and run with the reversion. (Section 8 applies only to leases made after March 24, 1911. See *The Landlord and Tenant Act*, R.S.O. 1914, c. 155, s. 9, unrepealed and unconsolidated.)

[45] *Supra*, note 40.

[46] *Standen v. Chrismas* (1847), 10 Q.B. (N.S.) 135, 116 E.R. 53. In England, the current statutory provisions apply as well to written and oral leases. Section 154 of the *Law of Property Act 1925*, *supra*, note 30, extends sections 141 and 142 thereof to an underlease "or other tenancy". See, generally, Megarry and Wade, *supra*, note 2, at 753.

[47] See *supra*, note 35, and accompanying text.

[48] *Rogers v. National Drug and Chemical Co.*, *supra*, note 36.

[49] *Cornish v. Stubbs*, *supra*, note 39, and *Rogers v. National Drug and Chemical Co.*, *supra*, note 36.

c. The Touch and Concern Requirement

We noted earlier that, in order for an assignee of the term or of the reversion to be subject to the burden, or entitled to the benefit, of the covenants contained in the lease, the covenant must "touch and concern" the land, or, in the language of the statutory provisions referred to earlier,[50] "have reference to the subject-matter of the lease".

As we indicated in our *Landlord and Tenant Report*, "[t]he question as to which covenants 'touch and concern' the land...is one that has given rise to considerable difficulty".[51] We shall not attempt to list those covenants that do, and those covenants that do not, fall within the definition. In general, a covenant will be said to touch and concern the land if it "affects either the landlord *qua* landlord or the tenant *qua* tenant".[52] Thus, it has been held that, in order to touch and concern the land, and not be merely personal or collateral, a covenant must affect the nature, quality or value of the thing demised, or the mode of using or enjoying it.[53]

(c) Transmission of the Benefit and Burden by Other Means

Although covenants in leases that are merely personal or collateral do not run at law, the benefit of such covenants, like the benefit of choses in action generally, can be assigned. The burden of such covenants, however, cannot.

Nevertheless, where the burden does not run at law in accordance with these rules, an assignee of the term or of the reversion, or, indeed, a sublessee or adverse possessor,[54] may be bound notwithstanding the fact that the burden cannot be assigned. Both the benefit and the burden may run with the land in equity, provided the covenant is restrictive. Restrictive covenants generally will be considered below.[55]

(d) Existing Proposals for Reform

In our Landlord and Tenant Report, we made a number of recommendations respecting the running of leasehold covenants. Of particular interest, in the present context, is the recommendation that the "touch and

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[50] See *supra*, notes 42 and 44.

[51] *Supra*, note 8, at 24.

[52] Cheshire and Burn, *supra*, note 2, at 425.

[53] *Mayor of Congleton v. Pattison*, *supra*, note 27.

[54] Since there is neither privity of contract nor privity of estate between a lessor and a sublessee or an adverse possessor, neither party can sue the other at law to enforce the covenants contained in the lease.

[55] See *infra*, this ch., sec. 5.

concern" requirement should be abolished.[56] In this connection, the Commission said the following:[57]

> Aside from the proviso discussed above [respecting "personal service" covenants], the central feature of the recommendation concerning the running of covenants is the removal, with respect to assignees of a landlord or tenant, of the requirement that a covenant 'have reference to the subject matter of the tenancy agreement' or 'touch and concern' the land in order that it run in favour of, or against, the assignee. All covenants are to be enforceable by or against an assignee, unless, as we recommend below, the parties to the tenancy agreement have agreed otherwise, or unless it is intended that performance of a service under the covenant is to be by the covenantor, and by him alone.
>
> The recommendation, if implemented, would result in the virtual elimination of the many difficulties and uncertainties inherent in the determination of whether a covenant 'touches and concerns' the land. It also represents, we believe, a realistic reflection of the expectations of the parties to a tenancy agreement.

This recommendation, as well as others made in the Report, has yet to be implemented. The removal of the touch and concern requirement would permit the benefit of leasehold covenants to exist in gross, that is, for the benefit of the covenantee personally. A similar recommendation is made in this Report, in the context of freehold land.[58]

4. COVENANTS RUNNING WITH FREEHOLD LAND AT LAW

(a) Introduction

There is a sharp divergence between law and equity respecting the ability of covenants to run with land. In equity, the rules, although complex, permit the burden as well as the benefit of restrictive covenants to be annexed to land. These rules will be examined below.[59] At law, however, the benefit of a covenant, whether restrictive or positive, can be made to run with the land, although the burden cannot.

(b) The Benefit of the Covenant

(i) The Position of the Original Parties

The original covenantee may enforce a covenant, whether positive or negative, against the original covenantor, since there is privity of contract

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[56] Landlord and Tenant Report, *supra*, note 8, at 28-30.

[57] *Ibid.*, at 29-30.

[58] See *infra*, ch. 4, sec. 3(b)(iv).

[59] See *infra*, this ch., sec. 5.

between them. Moreover, as we have indicated above,[60] the covenant also binds their personal representatives. Except under a deed poll,[61] that is, a unilateral deed, a person who is not a party to a deed cannot sue under it,[62] although a party does not have to execute the deed in order to be bound by it.[63] The situation is different in England by reason of section 56 of the *Law of Property Act 1925*,[64] which provides that a person may take the benefit of any covenant although the person is not named as a party to the instrument. By virtue of this provision, if a party to a deed covenants with the other party together with, for example, the owners of adjoining land for the time being, the current owners of the adjoining land can sue on the covenant, and, if the covenant is capable of running with land, the subsequent owners will be able to enforce the covenant as well.[65] However, it would seem that, in order for this section to operate, the covenant must be made with the third party and not be merely for the third party's benefit.[66]

(ii) The Position of Assignees

The benefit of a positive or restrictive covenant could run with an estate in land at common law if three conditions were satisfied: (1) it touched and concerned the land; (2) the covenantee had the legal estate in the land to be benefited; and (3) "the assignee seeking to enforce the covenant [had] the same legal estate as the covenantee, the benefit being annexed to that estate alone".[67]

A covenant touches or concerns the land if it benefits, or is to the advantage of, not only the covenantee, but also the covenantee's successors, and if it enhances the value of the land.[68] Thus, in *Smith v. River Douglas*

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[60] *Supra*, this ch., sec. 2.

[61] *Chelsea and Walham Green Building Society v. Armstrong*, [1951] Ch. 853, [1951] 2 All E.R. 250.

[62] *Lord Southampton v. Brown* (1827), 6 B. & C. 718, 108 E.R. 615 (K.B.).

[63] *Re Rowan and Eaton* (1927), 60 O.L.R. 245, [1927] 2 D.L.R. 722 (App. Div.).

[64] *Supra*, note 30. Section 56 derives from the *Real Property Act, 1845*, 8 & 9 Vict., c. 106 (U.K.), s. 5. This section was enacted in the *Property Act*, R.S.N.B. 1973, c. P-19, s. 14(1) and the *Real Property Act*, R.S.P.E.I. 1974, c. R-4, s. 10, but it was not enacted in Ontario. See Elliott, "The Effect of Section 56(1) of the Law of Property Act, 1925" (1956), 20 Conv. & Prop. Law. (N.S.) 43.

[65] *Urban District Council of Westhoughton v. Wigan Coal and Iron Co., Ltd.*, [1919] 1 Ch. 159, (1918), 120 L.T. (N.S.) 242 (C.A.) (subsequent reference is to [1919] 1 Ch.). See, also, Megarry and Wade, *supra*, note 2, at 763.

[66] *Beswick v. Beswick*, [1968] A.C. 58, [1967] 2 All E.R. 1197 (H.L.).

[67] Megarry and Wade, *supra*, note 2, at 766.

[68] *Rogers v. Hosegood*, [1900] 2 Ch. 388, [1900-03] All E.R. Rep. 915 (C.A.) (subsequent references are to [1900] 2 Ch.), and *Formby v. Barker*, [1903] 2 Ch. 539, at 554, [1900-03] All E.R. Rep. 445 (C.A.) (subsequent reference is to [1903] 2 Ch.).

Catchment Board,[69] where the Board had covenanted to keep river banks in repair, it was held that the covenant touched and concerned the adjacent land of the covenantee, which would be flooded if the repairs were not carried out. Hence, the covenantee's successor in title was able to enforce the covenant when the Board was in breach. If the covenant touches or concerns the land, it is enforceable by the successor to any part of the land that the covenant touches and concerns.[70]

Although, at common law, the covenantee and her assignee had to have the same legal estate in the land in order for the covenant to be enforceable by the assignee, by virtue of section 24(1) of the *Conveyancing and Law of Property Act*[71] this might no longer be so. Section 24(1) provides that "[a] covenant relating to land of inheritance...shall be deemed to be made with the covenantee, his heirs and assigns, and has effect as if heirs and assigns were expressed." The effect of this section appears to be that the assignee need not have the same legal estate as the covenantee had. Thus, if the covenantee holds the fee and the assignee is a lessee, the latter can enforce the covenant. That was the conclusion reached in England[72] under the comparable section of the *Law of Property Act 1925*.[73] However, the interpretation of the English section might depend upon the statutory reference to derivative titles,[74] a reference that does not appear in the *Conveyancing and Law of Property Act*. The English provision may thus be wider in scope than the Ontario provision.[75]

Before we turn to consider the burden of a covenant at common law, it should be emphasized that two matters, of critical importance in equity,[76]

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[69] [1949] 2 K.B. 500, [1949] 2 All E.R. 179 (C.A.).

[70] *Williams v. Unit Construction Co., Ltd.* (1955), 19 Conv. & Prop. Law. (N.S.) 262.

[71] *Supra*, note 7. The section derives from the *Conveyancing Act 1881*, 44 & 45 Vict., c. 41 (U.K.), s. 58.

[72] *Smith v. River Douglas Catchment Board*, *supra*, note 69.

[73] *Supra*, note 30, s. 78, s.s. (1) of which provides as follows:

> 78.—(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.
>
> For the purposes of this subsection in connexion with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

[74] This rationale has been criticized. See, for example, Megarry and Wade, *supra*, note 2, at 766-67.

[75] See *Dyson v. Forster*, [1909] A.C. 98, [1908-10] All E.R. Rep. 212 (H.L.), in which it was argued that s. 58 of the *Conveyancing Act 1881*, *supra*, note 71, had the same effect as s. 78 of the *Law of Property Act 1925*, *supra*, note 30, as the latter was interpreted in *Smith v. River Douglas Catchment Board*, *supra*, note 69. However, the decision was based solely upon the effect of s. 5 of the *Real Property Act, 1845*, *supra*, note 64.

[76] The running of covenants in equity is discussed *infra*, this ch., sec. 5.

are irrelevant to a consideration of the running of a covenant at law. First, in order for the benefit of a covenant to run with the land at law, it does not matter whether the covenant is restrictive or positive. In other words, the benefit may run whether the covenant requires the covenantor to do, or to refrain from doing, some act.[77] Secondly, it is not necessary that the covenant concern land of the covenantor. This was determined quite early, as is evident from *Pakenham's Case*.[78] In that case, Pakenham, as assignee, successfully sued a prior for breach of a covenant made with the plaintiff's great-grandfather to the effect that the prior, his successors, and his convent, should celebrate divine service weekly in the covenantee's chapel. The effect of *Pakenham's Case* was that the covenantor did not have to be connected with the land. By contrast, however, the assignee did have to own the land to which the benefit of the covenant was annexed.[79] The fact that the covenant need not concern land of the covenantor to run at law is also evident from *Smith v. River Douglas Catchment Board*[80] and from the statutory covenants for title, discussed below.

(iii) Covenants for Title

Covenants for title were allowed to run with the land at common law at a relatively early stage. However, the rule that the benefit of such covenants runs with an estate in land, together with the covenants themselves, have been codified by statute.[81] Section 23(1)l of the *Conveyancing and Law of Property Act* provides that, on a conveyance of freehold land for value by the beneficial owner, the following covenants by the vendor are implied: the right to convey, quiet enjoyment, freedom from encumbrances and further assurance.[82] The benefit of these covenants is annexed to the estate of the implied covenantee, and the covenants are made capable of enforcement by every person in whom the estate, or any part thereof, is from time to time vested.[83] Presumably, if the covenants are express—and, until recently, they

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[77] *Sharp v. Waterhouse* (1857), 7 E. & B. 816, 119 E.R. 1449 (Q.B).

[78] (1368), Y.B. 42 Edw. 3, Hil., pl. 14, Co. Litt. 385a.

[79] Y.B. 2 Hen. 4, Mich., pl. 25 (p. 6).

[80] *Supra*, note 69.

[81] *Conveyancing and Law of Property Act*, *supra*, note 7, s. 23. With respect to a transfer relating to land in a part of Ontario designated under Part I of the *Land Registration Reform Act, 1984*, S.O. 1984, c. 32, see the *Land Registration Reform Act, 1984*, s. 5, discussed *infra*, this sec.

[82] *Conveyancing and Law of Property Act*, *supra*, note 7. Section 23(1) also contains implied covenants in respect of the following: a conveyance of leasehold land (s. 23(1)2); a conveyance by a person as trustee, mortgagee, personal representative, committee, or under a court order (s. 23(1)3); and a conveyance by way of settlement (s. 23(1)4). Pursuant to s. 23(4), the covenants may be varied by the parties.

[83] *Ibid.*, s. 23(3).

commonly were included in every deed—they would also run with the land.[84]

The implied covenants are short forms, and the Act[85] incorporates the extended meaning given to them in Schedule B to the *Short Forms of Conveyances Act*.[86] Indeed, until recently, the standard form deed used in Ontario, which contained the same express covenants, was also expressed to be made pursuant to the latter Act. A comparison of the short form covenants with the extended meaning given to them in Schedule B of the *Short Forms of Conveyances Act* makes it clear that the covenants are qualified covenants only. That is, they impose liability upon the covenantor only for the acts and defaults of the covenantor and certain other persons, not for the conduct generally of her predecessors in title.[87]

Section 23 of the *Conveyancing and Law of Property Act*[88] no longer applies to conveyances of land executed after such land has been designated under Part I of the *Land Registration Reform Act, 1984*.[89] Since all land in Ontario has been so designated,[90] section 23 no longer applies to current conveyances. Its replacement is contained in section 5 of the *Land Registration Reform Act, 1984*, and the *Short Forms of Conveyances Act*[91] is made inapplicable thereto,[92] although there is no difference in substance, or in the running of the benefit, between the two regimes.[93] The new implied covenants are, in essence, the same as the old, although they are clarified somewhat. These covenants can no longer be expressed in the document

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[84] See *ibid.*, s. 24. See, also, Anger and Honsberger, *supra*, note 2, Vol. 2, §2404.7, at 1233, where it is said:

> The question arises whether express covenants run with the land. The Act does not say so, but surely this is unintentional. One would not expect a person to have greater rights under a covenant implied by statute than under the same covenant expressed in the deed.

[85] *Conveyancing and Law of Property Act*, *supra*, note 7, s. 23(1)l.

[86] R.S.O. 1980, c. 472.

[87] *Di Cenzo Construction Co. Ltd. v. Glassco* (1978), 21 O.R. (2d) 186, at 204, 90 D.L.R. (3d) 127 (C.A.), leave to appeal to the Supreme Court of Canada granted: 21 O.R. (2d) 186 *n*.

[88] *Supra*, note 7.

[89] *Land Registration Reform Act, 1984*, *supra*, note 81, s. 17(3).

[90] O. Reg. 580/84, s. 1(1), as am. by O. Reg. 35/85, s. 1(1).

[91] *Supra*, note 86.

[92] *Land Registration Reform Act, 1984*, *supra*, note 81, s. 23.

[93] *Ibid.*, s. 5(5). For standard mortgage and leasehold covenants see: *Mortgages Act*, R.S.O. 1980, c. 296, ss. 7 and 8; *Short Forms of Mortgages Act*, R.S.O. 1980, c. 474; *Short Forms of Leases Act*, *supra*, note 31; and *Land Registration Reform Act, 1984*, *supra*, note 81, ss. 5 and 7.

that is submitted for registration;[94] however, they can be varied in a schedule to a transfer.[95]

(c) The Burden of the Covenant

(i) Generally

We have already noted that the burden of a covenant cannot pass on a conveyance of freehold land at law.[96] It remains to consider why this is so. The leading case in this area is *Keppell v. Bailey*.[97] In that case the occupiers of an ironworks covenanted for themselves and their assigns to transport all limestone along a specific railroad. The original covenantors had assigned to the defendant, and the plaintiffs sought to enforce the covenant. It was held that the action could not be maintained because the covenant, being affirmative, could not run with the land at law and was unenforceable in equity. In the course of his judgment, Lord Brougham L.C. gave the following policy reasons for this decision:[98]

> [I]t must not...be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what right the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised.

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[94] See *supra*, note 84, and accompanying text.

[95] *Land Registration Reform Act, 1984*, *supra*, note 81, ss. 3(1)(a) and 5(4).

[96] *Supra*, this ch., sec. 4(a).

[97] (1834), 2 My. & K. 517, 39 E.R. 1042 (Ch.) (subsequent reference is to 39 E.R.).

[98] *Ibid.*, at 1049-50.

> The difference is obviously very great between such a case as this and the case of covenants in a lease, whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, although the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property that certain things should be reserved to the reversioners all the while the term continues; it is only something taken out of the demise, some exception to the temporary surrender of the enjoyment; it is only that they retain, more or less partially, the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end. Yet even in this case, the law does not leave the reversioner the absolute licence to invent covenants which shall affect the lands in the hands of those who take by assignment of the term. The covenant must be of such a nature as to 'inhere in the land'. . . . Within such limits restraints upon the land demised may be imposed, which shall follow into the hands of persons who are strangers to the contract of lease, and who only become privy to the lessor through the estate which they take by assignment in the demised premises. But this is no more than saying that, within such limits, the owner of the land may retain to himself and his assignees of the reversion a certain control over, or use of, the property which remains in himself, or which he has conveyed to those assignees; and that he may so retain it, into whose hands soever, as lessee, the temporary possession may have come. Even he, the continuing owner, is confined within certain limits by the view which the law takes of the nature of property; and if beyond those limits he were to imagine a stipulation, the covenant in which he should embody it would not run with the land, but only bind the lessee personally and his representatives.
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> It only requires a little attention to the cases to satisfy us, first, that even where the privity of lessor and lessee exists, there are bounds so narrow to the province of real covenants as would make the one in question lie on the extreme verge of it, if it did not fall without it; secondly, that there can be no doubt of such a covenant being one personal, collateral, or in gross, where there does not exist that, or some other privity of estate, which, according to one or two of the authorities only, and which I venture to doubt, has been held to render real covenants which would otherwise have been personal; and thirdly, that those covenants which have been held real, excepting, indeed, such as relate to title, would have been deemed collateral had there been no privity in respect of reversion or other unity of title.

It will be seen, therefore, that the burden of a positive covenant was not permitted to run with freehold land primarily because property titles would become heavily encumbered, and, consequently, the assignability of the land would be impeded. Despite some later attempts to permit the burden of affirmative covenants to run in equity,[99] the rule in *Keppell v. Bailey* became firmly established later in the nineteenth century.[100]

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[99] See *infra*, this ch., sec. 5(a).

[100] See, for example, *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750, in which grantees of land covenanted for themselves, their heirs and assigns to keep a road in repair. The covenant was held to be unenforceable against the grantees' assignee. See, also, *Haywood v. Brunswick Permanent Benefit Building Society* (1881), 8 Q.B.D. 403, 51 L.J.Q.B. (N.S.) 73 (C.A.), and *London and South Western Railway Co. v. Gomm* (1882), 20 Ch. D. 562, [1881-85] All E.R. Rep. 1190 (C.A.).

The rule enunciated above has been followed in Ontario. For example, *Re Albay Realty Ltd. and Dufferin-Lawrence Developments Ltd.*[101] concerned a covenant under which a grantee of land was given a right of first refusal with respect to other land owned by the grantor. It was held that while the benefit of the covenant could be assigned expressly by the grantee, as any chose in action, the burden could not be assigned by the grantor. Moreover, since the covenant did not touch and concern the land, but was merely personal to the grantor or grantee, it was held that the covenant did not run with the land so as to bind the grantor's assignee.[102]

The rule can have rather dramatic practical consequences. In *Parkinson v. Reid*,[103] the owners of adjoining lots entered into an agreement under which the defendant's predecessor in title convenanted for himself, his heirs, executors, administrators and assigns (1) to construct a stairway on his lot to serve as a common entrance for the buildings on both lots; (2) to repair and replace the stairway as needed; and (3) to permit the plaintiff's predecessor in title free and uninterrupted access via the stairway. The lots subsequently having passed into the hands of the plaintiff and the defendant and the stairway having been destroyed, the plaintiff brought action to require the defendant to replace the stairway. The Supreme Court of Canada refused to grant a mandatory injunction. The covenant to repair or reconstruct the stairway, being affirmative, was held not to run with the land, either at law or in equity.[104] It was further held that the covenant could not be enforced as an inherent part of the right of way granted in the agreement, since the positive obligation was inconsistent with the negative nature of an easement.

Interestingly, the Ontario cases do not give any policy reasons for the rule. It can be deduced, however, from the excerpt in *Keppell v. Bailey*[105] reproduced above, that at least two related reasons have been advanced for the existence of the rule generally. First, such covenants would tend to render land inalienable. Secondly, persons dealing subsequently with the land would have great difficulty in ascertaining the existence of such covenants, because they do not normally have a physical manifestation.

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[101] [1956] O.W.N. 302, 2 D.L.R. (2d) 604 (H.C.J.).

[102] See *Cities Service Oil Co. Ltd. v. Pauley*, [1931] O.R. 685 (H.C.J.), which is to the same effect. See, also, *Thompson v. Trepil Realty Ltd.*, [1962] O.R. 956, 34 D.L.R. (2d) 697 (H.C.J.), where, as an additional problem, the covenantee did not retain any land to which the benefit of the covenant could attach. By contrast, repurchase covenants create equitable interests in land that are enforceable against a subsequent purchaser who takes with notice: *Industro-Developments Mall Ltd. v. Barbieri* (1978), 20 O.R. (2d) 488, 88 D.L.R. (3d) 156 (H.C.J.), and *Weinblatt v. City of Kitchener*, [1969] S.C.R. 157, (1968), 1 D.L.R. (3d) 241.

[103] [1966] S.C.R. 162, 56 D.L.R. (2d) 315.

[104] Covenants running with freehold land in equity are discussed *infra*, this ch., sec. 5.

[105] *Supra*, note 97.

The second reason is not now, and was not then, an obstacle in Ontario. A system for recording deeds, which would enable anyone interested in land to ascertain the burdens upon it, had already been established in the province.[106] No such system of general application existed in England at the time the *Keppell* case was decided. Whether affirmative covenants tend to render land inalienable is a matter which we shall consider below.[107]

(ii) Methods of Avoiding the Rule

The inconvenience of the rule that the burden of a covenant cannot run with the land at law, particularly as it applies to positive covenants,[108] has resulted in the development of a number of methods by which the effect of the rule may be circumvented.

One such method of avoiding the rule is to rely on a chain of personal covenants, and thereby maintain privity of contract. For example, if a vendor exacts a covenant from a purchaser to maintain a watercourse running across the land sold and the land retained by the vendor, the purchaser can require a similar covenant from the person to whom he subsequently sells. The purchaser will do so because he will remain liable to the vendor for any breach of covenant, even after the subsequent resale, by reason of privity of contract. Although the vendor may not sue the transferee, he may sue the original purchaser who, in turn, can sue the transferee. The longer such a chain grows, however, the less likely it is to remain effective. It can be broken by the death, insolvency, or disappearance of one of the parties, or by the failure of one of them to take a covenant from his assignee. Moreover, the only remedy available in these cases is damages, whereas injunctive relief might be preferable in certain circumstances.

In England, a variety of other devices has been employed to avoid the problem.[109] The first involves the use of a rentcharge, which is a periodic payment charged on land. The device is useful in the enforcement of positive covenants because it is possible both to annex a right of entry, and impose a positive covenant, under a rentcharge. Indeed, it is common for the payment to be a nominal amount only, the purpose of the rentcharge being simply to enable the enforcement of the positive covenants.[110] Such

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[106] By *An act for the public registering of deeds, conveyances, wills, and other incumbrances, which shall be made, or may affect any lands, tenements, or hereditaments, within this province*, 35 Geo. 3, c. 5 (U.C.).

[107] See *infra*, ch. 4, sec. 2(b).

[108] While the burden of neither a positive covenant nor a restrictive covenant may run with the land at law, the burden of a restrictive covenant may run with the land in equity. See *infra*, this ch., sec. 5.

[109] For a full description of these devices, see Megarry and Wade, *supra*, note 2, at 767-70; English Report, *supra*, note 2, paras. 3.31-3.42, at 19-23; and Prichard, "Making Positive Covenants Run" (1973), 37 Conv. & Prop. Law. (N.S.) 194.

[110] This device was recognized in *Austerberry v. Corporation of Oldham*, *supra*, note 100, at 783, *per* Lindley L.J.

covenants are then enforceable in perpetuity.[111] It would appear that such a right of entry would also be exempt from perpetuities in Ontario.[112]

A third method of avoiding the rule is to rely upon the doctrine in *Halsall v. Brizell*.[113] This doctrine is based upon the old rule, relating to deeds, that a person who claims the benefit of a deed must also take it subject to the burdens. In the *Halsall* case, the purchasers of lots in a subdivision were entitled, under a trust deed, to use private roads and other amenities. Each purchaser covenanted to pay a share of the cost to maintain the amenities. The court held that their successors were liable to pay their share of the cost. The usefulness of the doctrine, however, is somewhat limited. It will operate only if there is a benefit to be claimed under the deed, and further, it will operate only so long as the assignee of the covenantor continues to claim that benefit.

In addition to the devices discussed above, the burden of certain positive covenants made in favour of public bodies can be made to run by statute. For example, provisions to this effect are contained in the *Planning Act, 1983*.[114] Under this Act, a person who purchases or otherwise acquires land in a community improvement area from a municipality must covenant to maintain the land and buildings and the use thereof in conformity with the plan until a zoning bylaw is passed for the area.[115] Similarly, an owner of land may be required to enter into an agreement with a municipality respecting the provision of facilities, services or matters in return for an increase in the height or density of a development.[116]

Either of the above agreements may be registered on title to the land, and the municipality is entitled to enforce the agreement against the other party or, subject to the provisions of the *Registry Act*[117] and the *Land Titles Act*,[118] against subsequent owners of the land.[119]

Under the *Planning Act, 1983*, an owner of land who is required by bylaw to provide parking facilities may be exempted from that obligation,

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[111] *Law of Property Act 1925*, *supra*, note 30, s. 4(3), and *Perpetuities and Accumulations Act 1964*, c. 55 (U.K.), s. 11.

[112] See *Perpetuities Act*, R.S.O. 1980, c. 374, ss. 14-15. It is also possible to annex a right of entry to a positive covenant without a rentcharge: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691, [1973] 1 All E.R. 966 (H.L.). However, the right of entry would then be subject to the perpetuity rule: *Perpetuities Act*, s. 15.

[113] [1957] Ch. 169, [1957] 1 All E.R. 371. See, also, *Tito v. Waddell (No. 2)*, [1977] Ch. 106, at 292 and 310, [1977] 3 All E.R. 129.

[114] S.O. 1983, c. 1.

[115] *Ibid.*, s. 28(9).

[116] *Ibid.*, s. 36(3).

[117] R.S.O. 1980, c. 445.

[118] R.S.O. 1980, c. 230.

[119] *Planning Act, 1983*, *supra*, note 114, ss. 28(10) and 36(4).

upon agreeing to make certain payments to the municipality.[120] This agreement may also be registered on title, and any amounts payable thereafter are deemed to be taxes due on the land, which may be collected in the same manner as municipal taxes.[121]

Finally, agreements required respecting the provision of facilities, works and other matters under a site plan,[122] or respecting the imposition of conditions under a plan of subdivision,[123] may be registered on title, and may be enforced against the owner or, subject to the provisions of the *Registry Act*[124] and the *Land Titles Act*,[125] against subsequent owners of the land.[126]

The rule prohibiting the running of the burden of positive covenants with freehold land presents a particular difficulty in the context of condominiums. Accordingly, legislation has been enacted to permit the enforcement of such covenants for condominiums governed by the legislation. Under the *Condominium Act*,[127] each unit owner is bound by the Act, the declaration establishing the condominium and the condominium corporation's bylaws and rules, and each has a right to the compliance thereof by the other owners.[128] Thus, for example, the unit owners are required to contribute to common expenses in the proportions specified in the declaration, which obligation is enforceable by lien.[129] Furthermore, a unit owner has a duty to maintain, and may have a duty to repair, his unit.[130]

5. COVENANTS RUNNING WITH FREEHOLD LAND IN EQUITY

(a) Introduction

In a substantial departure from the common law, equity allows both the benefit and the burden of covenants to run with land, but it does so only in respect of restrictive covenants. Thus, in equity, a covenant that is negative in its operation may be enforced against a successor of the covenantor. To

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[120] *Ibid.*, s. 39(1) and (2).

[121] *Ibid.*, s. 39(4).

[122] *Ibid.*, s. 40(7)(c) and (8)(b).

[123] *Ibid.*, s. 50(6).

[124] *Supra*, note 117.

[125] *Supra*, note 118.

[126] *Planning Act, 1983*, *supra*, note 114, ss. 40(10) and 50(6).

[127] R.S.O. 1980, c. 84.

[128] *Ibid.*, s. 31(1) and (2).

[129] *Ibid.*, s. 32.

[130] *Ibid.*, ss. 41-42.

this significant innovation must be added the fact that equitable remedies are available for the enforcement of such covenants. Hence, the injunction, a particularly valuable tool to ensure the continued observance of a restrictive covenant, is available to the covenantee.

The law of restrictive covenants finds its origin in the decision in *Tulk v. Moxhay*,[131] although there were some earlier cases that initiated the rule.[132]

In *Tulk v. Moxhay*, the defendant's predecessor in title purchased from the plaintiff the garden at the centre of Leicester Square. The purchaser covenanted with the plaintiff, his heirs, executors and administrators, that the purchaser, his heirs and assigns would maintain the garden in its open state, uncovered by any buildings and would permit the inhabitants of the square to use it upon payment of a reasonable rent. The defendant proposed to develop the garden and the plaintiff, who still owned several houses adjacent to the square, brought proceedings for an injunction. Lord Cottenham L.C. granted the injunction on the ground that a purchaser who took with notice of such a covenant was liable to observe it.

While the doctrine, from the above summary of the case, appears to be relatively straightforward, it was some years before its present form was finally settled. Indeed, there were some attempts to extend the doctrine to positive, as well as restrictive covenants,[133] but these foundered in due course.[134]

It will be seen from what follows that restrictive covenants partake of many of the aspects of easements. Indeed, a restrictive covenant is now regarded as creating a servitude or equitable interest in land.[135] As noted below,[136] one important result of this is that an adverse possessor is bound by restrictive covenants.[137]

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[131] (1848), 2 Ph. 774, 41 E.R. 1143 (Ch.) (subsequent reference is to 41 E.R.).

[132] *Whatman v. Gibson* (1838), 9 Sim. 196, 59 E.R. 333 (Ch.), and *Mann v. Stephens* (1846), 15 Sim. 377, 60 E.R. 665 (Ch.).

[133] *Morland v. Cook* (1868), L.R. 6 Eq. 252; *Cooke v. Chilcott* (1876), 3 Ch. D. 694; and *Andrew v. Aitken* (1882), 22 Ch. D. 218. See Bell, "Tulk v. Moxhay Revisited", [1981] Conv. & Prop. Law. 55. But see Griffith, "Tulk v. Moxhay Reclarified", [1983] Conv. & Prop. Law. 29. See, also, Gardner, "The Proprietary Effect of Contractual Obligations under *Tulk v. Moxhay* and *De Mattos v. Gibson*" (1982), 98 L.Q. Rev. 279.

[134] *Haywood v. Brunswick Permanent Benefit Building Society*, *supra*, note 100; *London and South Western Railway Co. v. Gomm*, *supra*, note 100; *Formby v. Barker*, *supra*, note 68; and *London County Council v. Allen*, [1914] 3 K.B. 642, [1914-15] All E.R. Rep. 1008 (C.A.) (subsequent reference is to [1914] 3 K.B.).

[135] *London County Council v. Allen*, *ibid*. See, also, Hayton, "Restrictive Covenants as Property Interests" (1971), 87 L.Q. Rev. 539, at 540-41.

[136] See *infra*, note 164 and accompanying text.

[137] *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, [1904-07] All E.R. Rep. 865.

(b) The Running of the Burden

For the burden of a restrictive covenant to run with the land in equity, five requirements must be satisfied: (1) the covenant must be negative in operation; (2) the covenantee must own land for the benefit of which the covenant was given; (3) the covenant must touch and concern the land of the covenantee; (4) the covenant must be intended to run with land belonging to the covenantor; and (5) the assignee of the covenantor must not be a *bona fide* purchaser for value of the legal estate without notice of the covenant.

We shall consider these five requirements in turn. It must be remembered, however, that, in accordance with the ordinary principles of contract law, the original covenantor remains liable on the covenant. Moreover, this contractual liability continues whether or not the covenant was entered into for the benefit of land of the covenantee, and whether or not the covenantor still retains the land burdened by the covenant.

(i) Negativity

While an essential requirement of a restrictive covenant is that it be negative, it need not be couched in negative language. Rather, it is the substance of the covenant that is determinative. Thus, a covenant, positive in form, will be restrictive if it is negative in its operation or nature. Indeed, the covenant in *Tulk v. Moxhay*[138] was positive in form, insofar as the covenantor agreed to maintain Leicester Square in an open state uncovered by any buildings, but it was negative in essence, since it was designed to prevent the convenantor from building in the square. A covenant to use land for residential purposes only is to the same effect, since its object is to prohibit its use for other purposes. Similarly, a covenant to purchase petroleum products only from the covenantee is restrictive, since its essence is an agreement not to purchase from others.[139]

A simple test to determine whether a covenant is positive is to ask whether its performance requires the expenditure of money. If it does, it is positive.[140] Typical of such covenants are those imposing an obligation to repair or to build. Similarly, a covenant not to let premises fall into disrepair is positive, although negative in form, because it obliges the covenantor to expend money on repairs. It does not follow, however, that if no expense is required, the covenant must be negative. For example, a covenant to permit the covenantee to enter onto the covenantor's land, for the purpose of effecting repairs, would be positive, even though it may be performed without expense.

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[138] *Supra*, note 131. See, also, *Ferris v. Ellis* (1920), 48 O.L.R. 374 (H.C. Div.).

[139] *Cities Service Oil Co. Ltd. v. Pauley*, *supra*, note 102, and *Canadian Petrofina Ltd. v. Rogers*, [1963] 1 O.R. 24, (1962), 35 D.L.R. (2d) 552 (H.C.J.).

[140] *Re Nisbet and Potts' Contract*, *supra*, note 137, *per* Farwell J., and *Parkinson v. Reid*, *supra*, note 103.

If a covenant includes both positive and negative elements, the latter may be severed and enforced.[141] Indeed, the covenant in *Tulk v. Moxhay*[142] contained a positive element, namely, the obligation to maintain the garden, as well as the negative element not to build upon it. Where, however, a positive obligation is a condition of a negative obligation, it would appear that both may be enforced. For example, a covenant to submit plans to the covenantee before building is, in essence, a covenant not to build before submitting plans. Since the positive obligation to submit plans is only a condition of the negative obligation not to build, it is enforceable.[143]

(ii) Land of the Covenantee

This requirement, together with the fourth requirement discussed below, import the concepts of dominant and servient tenements from the law of easements. Not only must there be land of the covenantor that is burdened by the covenant (the "servient tenement"), but there must also be land of the covenantee for the benefit of which the covenant is given (the "dominant tenement").

With respect to this latter requirement Romer L.J. said:[144]

> If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object. It appears to me that it is not legally permissible for him to assign the benefit of such a covenant to any person or persons he may choose, so as to place the assign or assigns in his position, with power again for them to assign, and so on indefinitely.

Similarly, Schroeder J.A. stated:[145]

> The law of Ontario and of the other common law Provinces plainly require that the dominant land for the benefit of which a restrictive covenant is imposed in a deed from the covenantee to a purchaser of other lands of the covenantee

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[141] *Shepherd Homes Ltd. v. Sandham (No. 2)*, [1971] 1 W.L.R. 1062, [1971] 2 All E.R. 1267 (Ch.).

[142] *Supra*, note 131.

[143] *Powell v. Hemsley*, [1909] 1 Ch. 680, aff'd 2 Ch. 252 (C.A.).

[144] *Formby v. Barker*, *supra*, note 68, at 554.

[145] *Re Sekretov and City of Toronto*, [1973] 2 O.R. 161, at 165-66, 33 D.L.R. (3d) 257 (C.A.) (subsequent reference is to [1973] 2 O.R.). See, also, *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639, 29 D.L.R. (2d) 153, rev'g 23 D.L.R. (2d) 6 (Ont. C.A.); *Hi-Way Housing (Sask.) Ltd. v. Mini-Mansion Construction Co. Ltd.* (1980), 115 D.L.R. (3d) 145, [1980] 5 W.W.R. 367 (Sask. C.A.); *Carroll v. Dominion Coal Co. Ltd.* (1910), 44 N.S.R. 209 (C.A.); *Ferris v. Ellis*, *supra*, note 138; and *Re Ferris and Ellis* (1921), 49 O.L.R. 264, 64 D.L.R. 202 (H.C. Div.).

> must be ascertainable from the deed itself; otherwise, it is personal and collateral to the conveyance as being for the benefit of the covenantee alone and not enforceable against a successor in title to the purchaser.

Thus, for example, a homeowners' association was unable to enforce a restrictive covenant since it owned no land capable of benefiting from the covenant.[146]

It follows from the foregoing that a restrictive covenant that exists "in gross", that is, one that burdens one parcel of land, but is not for the benefit of another, does not fall within the equitable doctrine. Such a covenant is merely personal between the parties, and may be enforced against the original covenantor only. In the leading case of *London County Council v. Allen*,[147] the defendant applied to the plaintiff council for permission to lay out a road. The council agreed, provided the defendant would covenant, on behalf of himself, his heirs and assigns, not to build upon it. While the council did have power to lay out streets, it did not own the fee in them. Thus, the plaintiff council owned no adjoining land. In the course of his judgment, Buckley L.J. said:[148]

> Upon the authorities, therefore, as a whole I am of opinion that the doctrine in *Tulk v. Moxhay* does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant. The doctrine is either an extension in equity of the doctrine in *Spencer's Case* (in which ownership of land by both covenantor and covenantee is essential) or an extension in equity of the doctrine of negative easements, a doctrine applicable not to the case of easements in gross, but to an easement enjoyed by one land upon another land. Where the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant.

Hence, it was held that the restrictive covenant could not run with the land of the covenantor since the covenantee owned no land for the benefit of which the covenant was created. Of course, as we have noted above, the plaintiff, being the original covenantee, could succeed against the original covenantor, but not against his assignee.

There are numerous Canadian cases in which this principle has been followed.[149] For example, in *R. v. York Twp., Ex Parte 125 Varsity Rd. Ltd.*,[150] a subdivision agreement required the subdivider to obtain consent

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[146] *Re British United Automobiles Ltd. and Volvo Canada Ltd.* (1980), 29 O.R. (2d) 725, 114 D.L.R. (3d) 488 (H.C.J.).

[147] *Supra*, note 134.

[148] *Ibid.*, at 660.

[149] See, for example, *Page v. Campbell* (1921), 61 S.C.R. 633, 59 D.L.R. 215, and *Playter v. Lucas* (1921), 51 O.L.R. 492, 69 D.L.R. 514 (App. Div.).

[150] [1960] O.R. 238, 23 D.L.R. (2d) 465 (C.A.).

to the removal of a ridge of earth, from the owners of land abutting certain building lots. In the absence of such consent, the subdivider was prohibited from building on the land. The appellants, to whom the lots were conveyed, were denied building permits because the necessary consents could not be obtained. The municipality argued that its statutory duty to regulate and control land use for the benefit and welfare of its inhabitants amounted to a dominant tenement. However, this argument was rejected on the basis that an actual dominant tenement was required.[151]

On the other hand, Canadian cases have sometimes stretched the rule in order to give effect to a covenant. For example, in *Besinnett v. White*[152] it was held that an oral agreement to acquire the dominant tenement at the time the covenant was taken by the plaintiff was sufficient to support the benefit if the land subsequently was acquired.[153] Moreover, it has been held that where a municipality owns the fee in its streets, the latter can qualify as the dominant tenement to support a restrictive covenant.[154]

The requirement that, in addition to the servient land, there must be dominant land for the benefit of which the covenant is given derives from the very rationale of the equitable doctrine. Equity intervened and created the new interest in property to permit the covenantee to preserve the value of his land in the neighbourhood.[155] It follows, therefore, that while the lands need not be contiguous, they must be in reasonably close proximity.[156] Furthermore, once the dominant tenement has been sold, the right to enforce the covenant passes with the dominant tenement, as a matter of property law, to the purchaser.[157] It should be noted, however, that since privity of contract exists between them, the original covenantee will retain a contractual right of action against the original covenantor, notwithstanding the conveyance.

There are several exceptions to the requirement that the covenantee must retain land for the benefit of which the covenant is given.[158] First, a

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[151] See, also, *Harrod v. Hadden* (1924), 25 O.W.N. 581 (H.C. Div.), in which a covenant in a deed from a municipality, which enjoined the grantee and his assigns from opening gravel pits, was held to be unenforceable because there was no dominant tenement.

[152] (1925), 58 O.L.R. 125, [1926] 1 D.L.R. 95 (App. Div.).

[153] To the same effect, see *Attorney-General v. Comox Logging Co. Ltd.*, [1955] 2 D.L.R. 211 (B.C.S.C.), and *Re Shortt and Griffin*, [1947] O.W.N. 782 (H.C.J.).

[154] *Re Daly and City of Vancouver* (1956), 5 D.L.R. (2d) 474 (B.C.S.C.).

[155] *Tulk v. Moxhay*, *supra*, note 131, at 1144.

[156] *Kelly v. Barrett*, [1924] 2 Ch. 379, at 403-04, 94 L.J. Ch. 1 (C.A.).

[157] *Chambers v. Randall*, [1923] 1 Ch. 149, at 157-58, [1922] All E.R. Rep. 565 (Ch.).

[158] In the context of leasehold covenants, the lessor's reversion takes the place of the requirement of a dominant tenement. Hence, a restrictive covenant contained in a lease may be enforced by a lessor against a sublessee, notwithstanding the absence of both privity of contract and privity of estate, provided, of course, the other requirements of

mortgagee's interest in land is sufficient to permit the enforcement of a restrictive covenant.[159] Secondly, the requirement is not applied to a building scheme, a concept that is discussed below.[160] Thirdly, specific legislative provisions permit certain public bodies, such as municipalities, to enforce restrictive covenants notwithstanding the fact that they have no land capable of being benefited by the covenant.[161]

(iii) The Covenant Must Touch and Concern the Dominant Land

Not only must the covenantee retain land for the benefit of which the covenant is given, but the covenant must touch and concern that land. That is, "the covenant must either affect the land as regards mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land".[162] Thus, the equitable doctrine will not apply if the covenant is intended to be for the personal benefit of the covenantee, rather than for the benefit of the dominant land.

(iv) Burden Upon the Covenantor's Land

The fourth requirement for the running of the burden of a restrictive covenant is that it must have been intended to create a burden upon the covenantor's land, and not merely a personal obligation of the covenantor. Thus, it must have been made, either expressly or impliedly, not only on behalf of the covenantor, but on behalf of her heirs and assigns as well. If the covenant was not made on their behalf, it will be unenforceable against them, and only the covenantor will be bound.[163]

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the equitable doctrine have been fulfilled. See *Hall v. Ewin* (1887), 37 Ch. D. 74 (C.A.), and *Regent Oil Co., Ltd. v. J.A. Gregory (Hatch End), Ltd.*, [1966] Ch. 402, at 433, [1965] 3 All E.R. 673, *per* Harmal L.J.

159 *John Brothers Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Cities Service Oil Co. Ltd. v. Pauley*, *supra*, note 102; and *Canadian Petrofina Ltd. v. Rogers*, *supra*, note 139.

160 See *infra*, this ch., sec. 5(c)(iii)c.

161 See, for example, the statutory references, *supra*, notes 114-16 and 119-23.

162 *Rogers v. Hosegood*, *supra*, note 68, at 395, *per* Farwell J., adopting *Mayor of Congleton v. Pattison*, *supra*, note 27, *per* Bayley J. See, also, *Lorne Ritchie Enterprises Ltd. v. Canada Life Assurance Co.*, [1976] 5 W.W.R. 130 (Man. Q.B.).

163 *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150. See, also, *Re Royal Victoria Pavilion, Ramsgate*, [1961] Ch. 581, [1961] 3 All E.R. 83. In England, the necessity of covenanting on behalf of the heirs and assigns of the covenantor has been altered by statute. Section 79 of the *Law of Property Act 1925*, *supra*, note 30, provides that, unless a contrary intention appears, covenants relating to the covenantor's land made after 1925 are deemed to have been made by the covenantor on behalf of himself, his successors in title and persons taking under them.

(v) Notice

The final requirement for the running of the burden of a restrictive covenant derives from the fact that the doctrine of restrictive covenants, being equitable in nature, is subject to the rule that a *bona fide* purchaser for value, who acquires land without notice of a restriction, takes the property free of that restriction. Accordingly, in order for the burden of a restrictive covenant to be enforceable against an assignee of the covenantor, the assignee must not be a *bona fide* purchaser for value of the legal estate without notice.[164] This requirement is of limited relevance in Ontario, however, because the equitable doctrine of notice has been replaced by the concept of statutory notice. Under the *Registry Act*, a purchaser for value takes free of a prior unregistered instrument unless the purchaser had actual notice before registration of the instrument under which he claims.[165] Moreover, under the *Land Titles Act*, priority of registration prevails, despite actual or constructive notice.[166] Thus, whether the land is subject to the *Registry Act* or the *Land Titles Act*, in order to protect the interest of the covenantee, the covenant should be registered on the title to the servient tenement.

Before we turn to consider the running of the benefit of a restrictive covenant, it should be noted that, even though the burden of a restrictive covenant may not run with the servient land in a particular case, a purchaser of the servient land may nevertheless be held liable for its breach. A covenantor does not breach the covenant upon agreeing to sell the burdened land to a purchaser who he knows will breach the covenant,[167] but the covenantor may be in breach where the covenant prohibits a sale in such

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[164] See Megarry and Wade, *supra*, note 2, at 779-80. Since an adverse possessor is not a *bona fide* purchaser, a restrictive covenant will be enforceable against him: *Re Nisbet and Potts' Contract*, *supra*, note 137.

[165] *Registry Act*, *supra*, note 117, s. 65(1). This is subject to certain limited exceptions. See s. 65(2) and (3). See, also, s. 66.

It would appear that, under the registry system, notice of restrictive covenants may be imputed to a person subsequently dealing with the land. In *White v. Lauder Developments Ltd.* (1975), 9 O.R. (2d) 363, 60 D.L.R. (3d) 419 (C.A.), the defendant purchased a shopping centre under five separate deeds. It then sold one of the stores to the plaintiff and in the deed the defendant agreed to exact a covenant from other purchasers prohibiting them from selling retail drugs and prescriptions, with the intention that the covenant should run with the land. Subsequent deeds to two purchasers of other stores did not contain the covenants. The plaintiff's action for an injunction was not granted, because the defendant did not covenant for itself and its assigns that they would not use the property for the proscribed purpose. Hence, it was a personal covenant only. However, the court noted that, if the covenant had run with the land, the purchasers of the other stores would have notice of it, because the deed to the plaintiff was registered upon the title to the same large parcel of land (part of a farm lot), as theirs, even though it did not appear in their chain of title.

[166] *Land Titles Act*, *supra*, note 118, s. 81(5).

[167] *Tophams Ltd. v. Earl of Sefton*, [1967] 1 A.C. 50, [1966] 1 All E.R. 1039 (H.L.), rev'g [1965] Ch. 1140, [1965] 3 All E.R. 1 (C.A.).

circumstances.[168] In this latter situation, an injunction will lie against the purchaser as well as the vendor to prevent the conveyance. Moreover, an action in damages may lie against the purchaser for inducing a breach of contract or for the tort of conspiracy.[169] Further, a mandatory injunction directing a reconveyance may also be obtained in these circumstances.[170]

(c) The Running of the Benefit

(i) Introduction

The original covenantee is able to maintain an action for breach against the original covenantor, in accordance with the ordinary principles of contract law, despite the fact that the covenantee has disposed of the dominant land.[171] However, assuming that the burden of the covenant runs with the servient tenement, the original covenantee is not able to maintain an action against the covenantor's assignee, unless the covenantee still retains all or part of the benefited land[172] at the time of the trial.[173]

The position, in equity, of an assignee of the covenantee is considerably more complex. As we discussed above,[174] whether a covenant is positive or restrictive, the benefit is capable of running with the land at law, in accordance with clearly defined principles. However, there are a number of situations in which an assignee of the covenantee will be unable to rely upon the common law rules—for example,[175] where the assignee holds only an equitable interest in the dominant land, or where the servient land has been

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168 See the Court of Appeal decision in *Tophams Ltd. v. Earl of Sefton*, *ibid*. This issue was not appealed to the House of Lords.

169 *Ibid*., and *Midland Bank Trust Co. Ltd. v. Green (No. 3)*, [1982] Ch. 529, [1981] 3 All E.R. 744 (C.A.).

170 *Esso Petroleum Co. Ltd. v. Kingswood Motors (Addlestone) Ltd*., [1974] Q.B. 142, [1973] 3 All E.R. 1057.

171 *Re Hunt and Bell* (1915), 34 O.L.R. 256, 24 D.L.R. 590 (App. Div.), and *London County Council v. Allen*, *supra*, note 134.

172 *Re Hunt and Bell*, *supra*, note 171; *Re Wheeler* (1926), 59 O.L.R. 223, [1926] 4 D.L.R. 392 (App. Div.); *London County Council v. Allen*, *supra*, note 134, app'd in *Re Bowes Co. Ltd. and Rankin* (1924), 55 O.L.R. 601, [1924] 4 D.L.R. 406 (App. Div.); *Re Keyser and Daniel J. McA'Nulty Realty Co. Ltd.* (1923), 55 O.L.R. 136 (App. Div.); and *Playter v. Lucas*, *supra*, note 149. See, also, *Attorney-General for Ontario v. Great Lakes Paper Co. Ltd.* (1921), 50 O.L.R. 78, 64 D.L.R. 159 (H.C. Div.); *Anderson v. Moran*, [1928] 3 D.L.R. 491, [1928] 2 W.W.R. 307 (Alta. S.C., App. Div.); and *Wanek v. Thols*, [1928] 2 D.L.R. 793, [1928] 1 W.W.R. 903 (Alta. S.C., App. Div.).

173 See *Page v. Campbell*, *supra*, note 149, in which the covenantee still retained some of the dominant land when the writ was issued, but had disposed of it prior to the time of trial.

174 See *supra*, this ch., sec. 4(b)(ii).

175 See Cheshire and Burn, *supra*, note 2, at 589-90.

conveyed, and enforcement of the covenant against the assignee of the covenantor therefore depends upon the equitable doctrine. In these, and other cases,[176] the assignee of the covenantee will have to satisfy the equitable rules for the running of the benefit.

An assignee of the covenantee will be unable to sue either the covenantor, or her successor, unless the assignee retains all or part of the dominant land.[177] Moreover, as we discuss below, it must also be shown that the assignee is entitled to the benefit of the covenant.

The equitable rules respecting the right of the covenantee's assignee to enforce a covenant are somewhat technical and stringent. These rules appear to have displaced the simpler rules of law discussed earlier.[178] For the benefit of a restrictive covenant to run with the dominant land in equity, it would appear that two requirements must be satisfied: (1) the covenant must touch and concern the dominant tenement; and (2) the assignee must demonstrate entitlement to the benefit. These elements are considered below.

(ii) The Covenant Must Touch and Concern the Dominant Land

The first requirement, that the covenant must touch and concern the dominant land, is the same as the legal rule and is a matter that will be established by the evidence.[179] Since this rule has already been discussed,[180] we need not repeat that discussion here.

(iii) Entitlement to the Benefit

The requirement that the assignee must demonstrate entitlement to the benefit may be fulfilled by establishing that the covenant was annexed to the land and passed to the assignee upon the conveyance, that it was expressly assigned to the assignee, or that both the dominant and the servient tenements are comprised in a building scheme. Although this requirement is, in essence, the same as the rule that the covenant must touch and concern the dominant land,[181] the technicalities of the alternative methods of satisfying this requirement are such that they must be considered separately.

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[176] *Ibid.*

[177] *West v. Hughes* (1925), 58 O.L.R. 183, [1926] 1 D.L.R. 359 (H.C. Div.).

[178] *Supra*, this ch., sec. 4(b)(ii). See, also, *Re Union of London and Smith's Bank Ltd.'s Conveyance*, [1933] Ch. 611, at 630, [1933] All E.R. Rep. 355 (C.A.) (subsequent references are to [1933] Ch.).

[179] *Ibid.*; *Rogers v. Hosegood*, *supra*, note 68; and *Re Ballard's Conveyance*, [1937] Ch. 473, [1937] 2 All E.R. 691.

[180] *Supra*, this ch., sec. 4(b)(ii).

[181] Megarry and Wade, *supra*, note 2, at 781.

a. Annexation

The question whether the benefit of a covenant has been annexed so as to run with the dominant land is one of intention, dependent upon the construction of the instrument, the nature of the covenant, and the surrounding circumstances.[182] Thus, the benefit may be annexed to the dominant land expressly by proper terminology. The requisite intention may be established, for example, by providing expressly that the covenant is taken for the benefit of particular land. Alternatively, it may be established by providing that the covenant is for the benefit of the owners, for the time being, of the dominant tenement. Thus, for instance, the necessary intent has been inferred from the language of the covenant where it was expressed to enure to the benefit of the covenantees, their heirs and assigns and others claiming under them.[183]

In *Re Bowes Co. Ltd. and Rankin*,[184] a company sold a vacant parcel of land to the applicant company. Since the vendor owned two other parcels of land in the same village, on each of which was a canning factory, it exacted a covenant from the purchaser whereby the purchaser covenanted for itself, its successors and assigns, with the vendor, its successors and assigns, not to use the land for a cannery. Subsequently, the applicant company agreed to sell the land to the respondent. On a vendor and purchaser application it was held that the covenant was enforceable, even though the dominant tenement was not identified expressly, because it was clearly the parties' intention to benefit the business carried on by the canning company on the two remaining parcels upon which it operated canning factories.

In *Galbraith v. Madawaska Club Ltd.*,[185] the club conveyed lands to various purchasers who covenanted for themselves, their heirs and assigns with the club, its successors and assigns to the intent that: (1) the burden of the covenant should run with the land during the club's existence; (2) that the land would not be transferred to anyone not a member of the club; and (3) that it would be held subject to the club's bylaws. The bylaws required approval by the board of directors for occupation of the premises by non-members. The deeds did not refer to any club lands to be benefited. It was held that the plaintiff was not bound by the restrictions because the covenant did not touch and concern any dominant land. Indeed, the covenant had nothing to do with the use of the burdened lands, but rather concerned their occupation. As a result, it was a personal covenant, imposed for the benefit of the club. It was further held that there had been no express

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[182] *Rogers v. Hosegood*, *supra*, note 68; *Re Lakhani and Weinstein* (1980), 31 O.R. (2d) 65, 118 D.L.R. (3d) 61 (H.C.J.); *Bank of Montreal v. University of Saskatchewan* (1953), 9 W.W.R. (N.S.) 193 (Sask. Q.B.); and *Oluk v. Marahrens* (1976), 68 D.L.R. (3d) 294, [1976] 4 W.W.R. 94 (Alta. S.C., App. Div.), leave to appeal to the Supreme Court of Canada refused, 68 D.L.R. (3d) 294*n*.

[183] *Rogers v. Hosegood*, *supra*, note 68.

[184] *Supra*, note 172.

[185] *Supra*, note 145.

annexation of the benefit of the covenant to any dominant lands. At a minimum, the deed was required to define the dominant land such that it could be easily ascertained.

Moreover, if a covenant is imposed without mention of a dominant tenement, there being no annexation of the benefit, it will be held to be purely personal, as being merely for the benefit of the vendor alone.[186]

It has often been said that, because annexation cannot be implied, the deed must define the dominant land with sufficient specificity that it may be easily ascertained.[187] Thus, in both *Galbraith v. Madawaska Club Ltd.*[188] and *Re Sekretov and City of Toronto*[189] a restrictive covenant was held to be unenforceable because the dominant land was not ascertainable from the deed creating the covenants.

In *Re Lorne Park Estates Association and Regional Assessment Commissioner, Region No. 15*,[190] it was further held that *both* the dominant and servient lands must be ascertainable from the deed creating the covenant.

There would appear to be a trend, in the recent English jurisprudence, to relax the requirement of specificity and permit implied annexation in those cases in which there can be no real doubt about the parties' intention.[191] In Ontario, however, unless the deed or transfer contains a proper description of the lands affected, it cannot be registered.[192] The need to rely upon the notion of implied annexation, therefore, will largely be avoided in Ontario since, in effect, the recording statutes will ensure that the dominant land is ascertainable from the deed.

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186 *Canadian Construction Co. Ltd. v. Beaver (Alberta) Lumber Ltd.*, [1955] S.C.R. 682, [1955] 3 D.L.R. 502; *Re Keyser and Daniel J. McA'Nulty Realty Co. Ltd.*, *supra*, note 172; *Bank of Montreal v. University of Saskatchewan*, *supra*, note 182; and *Re Pidgeon*, [1938] O.W.N. 292, [1938] 3 D.L.R. 494 (C.A.).

187 *Rogers v. Hosegood*, *supra*, note 68; *Galbraith v. Madawaska Club Ltd.*, *supra*, note 145; *Re Sekretov and City of Toronto*, *supra*, note 145; and *Newton Abbot Co-operative Society Ltd. v. Williamson & Treadgold Ltd.*, [1952] Ch. 286.

188 *Supra*, note 145.

189 *Supra*, note 145. In this case the covenant, being dependent upon municipal resolutions, was also held void for uncertainty.

190 (1979), 23 O.R. (2d) 628, 97 D.L.R. (3d) 181 (H.C.J.). In this case the covenant was also held to be vague and uncertain.

191 *Marten v. Flight Refuelling Ltd.*, [1962] Ch. 115, at 133, [1961] 2 All E.R. 696; *Shropshire County Council v. Edwards* (1982), 46 P. & C.R. 270 (Ch.); *Urban District Council of Westhoughton v. Wigan Coal and Iron Co., Ltd.*, *supra*, note 65, at 170; and *Federated Homes Ltd. v. Mill Lodge Properties Ltd.*, [1980] 1 W.L.R. 594, [1980] 1 All E.R. 371 (C.A.) (subsequent references are to [1980] 1 W.L.R.). See, also, Ryder, "Restrictive Covenants: The Problem of Implied Annexation" (1972), 36 Conv. & Prop. Law. (N.S.) 20.

192 *Registry Act*, *supra*, note 117, ss. 22 and 22a, enacted by S.O. 1984, c. 32, s. 22(13); R.R.O. 1980, Reg. 898, s. 54, as am. by O. Reg. 577/84, s. 9 and O. Reg. 34/85, s. 1; and *Land Titles Act*, *supra*, note 118, ss. 141a and 141b, enacted by S.O. 1984, c. 32, s. 19(14). See, also, *Re Campbell and Cowdy*, 61 O.L.R. 545, [1928] 1 D.L.R. 1034 (App. Div.).

It has also been held in England, in *Federated Homes Ltd. v. Mill Lodge Properties Ltd.*,[193] that, if the covenant touches and concerns the land, annexation is automatic by virtue of section 78 of the *Law of Property Act 1925*.[194] That section provides that a covenant relating to land shall be deemed to be made with the covenantee and his successors in title and those deriving title under them, unless the contrary is expressed. Section 78 thus establishes that the covenant is not intended merely for the personal benefit of the covenantee, but rather is for the benefit of the covenantee and his successors. If the covenant also touches and concerns the dominant land, all of the requirements for annexation are satisfied.[195] The *Federated Homes* case has been criticized,[196] but has not been reversed.[197] While the comparable Ontario provision[198] is similar, it has been drafted in somewhat narrower language,[199] and, accordingly, might not be construed as automatically annexing the benefit.

It could also be argued that annexation occurs automatically by virtue of section 15 of the *Conveyancing and Law of Property Act*,[200] subsection (1) of which provides as follows:

> 15.—(1) Every conveyance of land, unless an exception is specially made therein, includes all...liberties, privileges, easements...hereditaments and

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[193] *Supra*, note 191.

[194] *Supra*, note 30.

[195] Megarry and Wade, *supra*, note 2, at 786.

[196] Preston and Newsom, *supra*, note 2, at 17-19; Newsom, "Universal Annexation?" (1981), 97 L.Q. Rev. 32; and Newsom, "Universal Annexation? A Postcript" (1982), 98 L.Q. Rev. 202.

[197] In *Roake v. Chadha*, [1984] 1 W.L.R. 40, [1983] 3 All E.R. 503 (Ch.) (subsequent reference is to [1983] 3 All E.R.) a covenant was specifically stated not to enure for the benefit of any owner or subsequent purchaser of the dominant land, unless the benefit was assigned expressly. It was held that, notwithstanding s. 78 of the *Law of Property Act 1925* and the decision in *Federated Homes*, the benefit was not annexed to the dominant land. It was still necessary "to consider the covenant as a whole to determine its true effect": *ibid*., at 508.

[198] *Conveyancing and Law of Property Act*, *supra*, note 7, s. 24, which provides as follows:

> 24.—(1) A covenant relating to land of inheritance or to land held for the life of another shall be deemed to be made with the covenantee, his heirs and assigns, and has effect as if heirs and assigns were expressed.
>
> (2) A covenant relating to land not of inheritance or to land not held for the life of another shall be deemed to be made with the covenantee, his executors, administrators and assigns, and has effect as if executors, administrators and assigns were expressed.

[199] The effect of these provisions in the context of the running of the benefit of covenants at law is discussed *supra*, this ch., sec. 4(b)(ii).

[200] *Supra*, note 7. The comparable English provision, s. 62 of the *Law of Property Act 1925*, *supra*, note 30, was held to have this effect at trial in the *Federated Homes* case, *supra*, note 191, at 601, *per* Brightman L.J. See, also, Megarry and Wade, *supra*, note 2, at 787.

> appurtenances whatsoever to such land belonging or in anywise appertaining, or with such land demised, held, used, occupied and enjoyed...and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever of the grantor into, out of or upon the same land....

If it is intended that annexation of the benefit of a covenant should be to the whole of the dominant land, annexation will not be effective, unless the entire parcel is capable of benefiting.[201] Moreover, if the benefit of a covenant is annexed to the whole of the covenantee's land, in the absence of an express assignment,[202] the right to enforce it will not pass with a conveyance of only part of the estate.[203] However, annexation to the whole and "each and every part" of the parcel will be effective to annex the covenant to those parts of the dominant land that are in fact capable of benefiting from it; and the right to enforce the covenant will pass upon a coveyance of part of the estate.[204]

The question whether the benefit of a covenant is annexed to the whole of the dominant land, or to each and every part of it, is one of construction of the relevant instrument. In the *Federated Homes*[205] case, however, it was held that if, upon a proper construction of the instrument, the benefit of a covenant is annexed to the dominant land, *prima facie* it is annexed to every part of it, unless a contrary intention appears. The convenience of such a *prima facie* rule has been acknowledged and provided for elsewhere by statute.[206]

If the benefit of the covenant is annexed to the dominant land, an assignee of the covenantee can enforce the covenant against the original covenantor and, provided the burden of the covenant also runs with the servient land, against her assignees, even if the grantee did not know of the covenant at the time of the conveyance.[207]

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201 *Re Ballard's Conveyance*, *supra*, note 179.

202 Assignment of the benefit of restrictive covenants is discussed *infra*, this ch., sec. 5(c)(iii)b.

203 *Re Ballard's Conveyance*, *supra*, note 179; *Zetland v. Driver*, [1939] Ch. 1, [1938] 2 All E.R. 158 (C.A.); *Russell v. Archdale*, [1964] Ch. 38, [1962] 2 All E.R. 305; *Re Jeffs' Transfer (No. 2)*, [1966] 1 W.L.R. 841, [1966] 1 All E.R. 937 (Ch.); *Griffiths v. Band* (1974), 29 P. & C.R. 243 (Ch.); and *Stilwell v. Blackman*, [1968] Ch. 508, [1967] 3 All E.R. 514. See, also, Note (1962), 78 L.Q. Rev. 334 and 482.

204 *Zetland v. Driver*, *supra*, note 203.

205 *Supra*, note 191, at 606, *per* Brightman L.J.

206 See, for example, *Property Law Act*, R.S.B.C. 1979, c. 340, s. 21.

207 *Rogers v. Hosegood*, *supra*, note 68, at 407, *per* Collins L.J., and *Lawrence v. South County Freeholds, Ltd.*, [1939] Ch. 656, [1939] 2 All E.R. 503.

b. Assignment

If the benefit of a covenant has not been annexed, but is otherwise capable of running with the dominant land, a purchaser of the dominant land may still be entitled to enforce it if, in conjunction with the conveyance, the grantee also receives an express assignment of the benefit of the covenant.[208]

Enforcement of the covenant in these circumstances, against the original covenantor, creates no particular difficulties. In accordance with the ordinary principles governing the assignment of choses in action generally, the benefit of the covenant, like any chose in action, may be enforced by an assignee against the original covenantor or the covenantor's personal representative.[209] However, a complicating factor is introduced when it is sought to enforce the covenant against an assignee of the servient land. The distinction between these two situations, it has been suggested, is that "when the burdened land passes from the covenantor, one leaves the realm of contract and enters that of property. The question then ceases to be exclusively a matter of what the original parties...agreed, but what incidents the law will allow."[210] Since the burden of a covenant can be enforced against an assignee of the servient land only under the equitable doctrine of *Tulk v. Moxhay*,[211] equity will permit such enforcement, by an assignee of the benefit, only if specific requirements for assignment have been satisfied. These requirements are discussed below.

First, it would seem that, as against a successor of the covenantor, an assignment of the benefit will be effective only if the covenant has been assigned contemporaneously with the sale of the dominant land.[212] As we noted above,[213] equity created the property interest in order to preserve the value of the covenantee's land. If the covenantee has been able to dispose of the dominant land without also assigning the covenant as part of the transaction, any subsequent assignment by the covenantee would not be necessary to fulfil the purpose for which the interest was created. In such circumstances equity will not assist in the enforcement of the covenant.[214]

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208 *Renals v. Cowlishaw* (1878), 9 Ch. D. 125, 48 L.J. Ch. 33, aff'd [1874-80] All E.R. Rep. 359 (C.A.) (subsequent reference is to 9 Ch. D.), and *Reid v. Bickerstaff*, [1909] 2 Ch. 305, at 320, [1908-10] All E.R. Rep. 298 (C.A.) (subsequent references are to [1909] 2 Ch.).

209 See *supra*, this ch., sec. 2.

210 Baker, "The Benefit of Restrictive Covenants" (1968), 84 L.Q. Rev. 22, at 31-32.

211 *Supra*, note 131.

212 *Re Union of London and Smith's Bank Ltd.'s Conveyance*, *supra*, note 178, at 632, *per* Romer L.J.

213 *Supra*, this ch., sec. 5(b)(ii).

214 *Re Union of London and Smith's Bank Ltd.'s Conveyance*, *supra*, note 178, at 632, *per* Romer L.J.

Secondly, it is axiomatic that the assignee must be able to show that the covenant was intended to benefit the dominant land. This may be proved, however, from the surrounding circumstances.[215]

Thirdly, the dominant land must be identified with reasonable certainty.[216] In England, it has been held that the deed containing the covenant need not define the benefited land in order for the assignment to be effective, so long as the benefited land is otherwise indicated with reasonable certainty.[217] In Ontario the law appears to be to the contrary. Canadian authorities indicate that an express assignment of a covenant can be effective only if the dominant tenement is ascertainable from the original deed that imposed the covenant.[218] Indeed, Schroeder J.A. expressly rejected the English view, emphasizing that under the Ontario recording systems a purchaser of the burdened land should be able to tell from the record, or from her deed, what land is to be benefited by the covenant.[219] The Ontario recording statutes, moreover, do not permit the registration of a covenant unless the dominant land is mentioned in it with the required specificity.[220] Under this legislation, therefore, an express assignment can be effective only if both it and the original deed describe the dominant land. If that is the case, there is very little difference between annexation and assignment.

There remains to be considered the question whether the effect of an express assignment is to annex the benefit, such that it thereafter passes automatically upon a conveyance of the dominant land, without the need for further assignment. Although it may be possible to support this effect on principle,[221] the issue would appear to be unsettled.[222]

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215 *Newton Abbot Co-operative Society Ltd. v. Williamson & Treadgold Ltd.*, *supra*, note 187.

216 *Re Union of London and Smith's Bank Ltd.'s Conveyance*, *supra*, note 178, at 631, *per* Romer L.J.

217 *Ibid.*; *Newton Abbot Co-operative Society Ltd. v. Williamson & Treadgold Ltd.*, *supra*, note 187; and *Marten v. Flight Refuelling Ltd.*, *supra*, note 191.

218 *Galbraith v. Madawaska Club Ltd.*, *supra*, note 145; *Re Sekretov and City of Toronto*, *supra*, note 145; and *Hi-Way Housing (Sask.) Ltd. v. Mini-Mansion Construction Co. Ltd.*, *supra*, note 145.

219 *Re Sekretov and City of Toronto*, *supra*, note 145, at 166-67.

220 *Land Titles Act*, *supra*, note 118, s. 118(4)(c), and *Registry Act*, *supra*, note 117, s. 22(1).

221 See, for example, Megarry and Wade, *supra*, note 2, at 789.

222 The notion that annexation occurs consequent upon an express assignment would appear to be supported by *Renals v. Cowlishaw*, *supra*, note 208, at 130-31; *Rogers v. Hosegood*, *supra*, note 68, at 408; and *Reid v. Bickerstaff*, *supra*, note 208, at 320. However, in *Re Pinewood Estate, Farnborough*, [1958] Ch. 280, [1957] 2 All E.R. 517, it was assumed that a chain of assignments was necessary. Further, holding that annexation did not prevent a subsequent express assignment of the covenant, *Stilwell v. Blackman*, *supra*, note 203, would appear to be inconsistent with the notion. It has also been suggested that the notion is inconsistent with the decision in *Re Sekretov and City of Toronto*, *supra*, note 145: see Anger and Honsberger, *supra*, note 2, Vol. 2, §1703.2, at 912.

One commentator has suggested[223] that an assignee of the covenantor should be bound by a covenant only if the benefit has been annexed to the dominant land before the original covenantor disposed of the servient land, and that, in the absence of a building scheme,[224] the benefit may be annexed to the dominant land either by the terms of the original covenant, or by an express assignment. Thus, it is argued, an express assignment of a covenant amounts to "delayed annexation".[225]

The covenantor's assignee would not be prejudiced by this notion of "delayed annexation".[226] The priority provisions contained in the land registration statutes[227] would ensure that, where the deed containing the assignment of the covenant is registered after the deed transferring the servient land, the covenantor's assignee will not be bound.[228] Thus, if the original deed describes the benefited land, but does not annex the benefit of the covenant, a subsequent assignment of the benefit would not bind an assignee of the covenantor unless he had actual notice of the restriction before he registered. Thereafter, subsequent assignees of the servient land could rely upon the doctrine of sheltering.[229]

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223 See Baker, *supra*, note 210, at 29-30.

224 Discussed *infra*, this ch., sec. 5(c)(iii)c.

225 See Baker, *supra*, note 210, at 29-30. The rationale for these conclusions is as follows (at 29-30):

> From the principles outlined above, and especially from the analogy of easements, we should expect the right to go along automatically with the benefited or dominant land, and, indeed, this happens where the benefit has been annexed by the original covenant. There is, however, a complicating factor as not every restrictive covenant is initially annexed, and in these cases the covenantee has the option of annexing it to the land or allowing it to lapse. As it cannot exist as a separate piece of property like a profit in gross, there seems to be no justification in principle for requiring it to be passed by a succession of assignments parallel with the assignment of the benefited land, for this is still treating it as either a covenant which is only enforceable as such against the covenantor, or as existing in gross. If the original covenantor is still the owner of the burdened land, the benefit of the covenant could be assigned separately and then ultimately annexed, but if the burdened land has passed it is annexation or nothing, for it is a piece of property which is an adjunct of the benefited land. In other words, express assignment is delayed annexation. One puts together the deed containing the original covenant and the subsequent conveyance of the benefited land. The original covenant in these cases does not have to indicate the benefited land, but that deficiency is naturally supplied by the subsequent conveyance of it.

226 See Anger and Honsberger, *supra*, note 2, Vol. 2, §1703.2, at 912.

227 *Land Titles Act*, *supra*, note 118, s. 81(5), and *Registry Act*, *supra*, note 117, ss. 65-66.

228 See Anger and Honsberger, *supra*, note 2, Vol. 2, §1703.2, at 912.

229 See *Gray v. Coughlin* (1891), 18 S.C.R. 553, at 568, 16 O.A.R. 224, *per* Strong J., and Anger and Honsberger, *supra*, note 2, Vol. 2, §3203.1(e), at 1601. The dicta of Boyd C. in *Heney v. Kerr* (1914), 30 O.L.R. 506, 19 D.L.R. 597 (H.C. Div.) to the contrary are unconvincing: Smout, *supra*, note 2, at 119-21.

c. Development Schemes

The term "development scheme" encompasses not merely the well-known "building scheme", which involves the sale of building lots according to a plan and subject to restrictive covenants, but also "rental schemes", which are often used in shopping centres, and schemes involving land already built upon, but sold or let in parts.[230] Building schemes are discussed below. Rental schemes, in which a lessor imposes restrictive covenants on a property to be leased in units, with the intention that the covenants will be mutually enforceable among the several lessees, are not discussed separately below. Nor is the last type of development scheme, which appears not to be common in Canada. In either case, however, they operate on principles similar to building schemes.

A restrictive covenant might be enforceable, notwithstanding the absence of privity of contract, if both the dominant land and the servient land are included within a building scheme. Equity developed the special rules regarding building schemes, which differ to some extent from the rules respecting restrictive covenants, to deal with restrictions imposed for the purpose of land development. A building scheme may exist, therefore, when restrictive covenants are imposed during the course of development with the intent that once the scheme has crystallized on the sale of the first lot or unit, the vendor will be bound by the scheme and the restrictions will be mutually enforceable by the purchasers of the several lots or units. In essence, once a building scheme has been established, equity treats the development as having its own local law.[231]

Since the restrictions are imposed for the general benefit of the development, all owners have a common interest in their enforcement. "This community of interest", it has been said, "necessarily...requires and imports reciprocity of obligation".[232] Accordingly, the restrictions imposed upon each lot within the building scheme are enforceable against the original purchaser, and his assignees, by the purchasers of every other lot in the scheme, and their assignees. These mutual rights and liabilities arise notwithstanding the absence of express provisions to that effect among the various purchasers.[233] Moreover, as noted above, the vendor is also bound by the scheme.[234]

The doctrine of sheltering applies where a person with notice of a prior interest purchases from a person who bought and registered without notice of the interest. The subsequent purchaser takes free of the prior interest, even though he is with notice, since he is permitted to "shelter" under his vendor's deed.

230 See Megarry and Wade, *supra*, note 2, at 793.

231 *Reid v. Bickerstaff*, *supra*, note 208, at 319.

232 *Spicer v. Martin* (1888), 14 App. Cas. 12, at 25, [1886-90] All E.R. Rep. 461 (H.L.), *per* Lord Macnaghten.

233 *Ibid.*

234 *Brunner v. Greenslade*, [1971] Ch. 993, at 1003, [1970] 3 All E.R. 833, *per* Megarry J.

The classic statement of the conditions necessary for the creation of a building scheme, one which is often quoted in the Ontario cases,[235] was set out by Parker J. in *Elliston v. Reacher* as follows:[236]

> (1) that both the plaintiffs and defendants[237] derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.

While this is the traditional view of the requirements of a building scheme, in England the requirements have been very much relaxed in recent years. It would appear that, at present, English law requires only that the area of the scheme be clearly defined and that there be an intention to impose a scheme of restrictions, for the benefit of the purchasers and their successors, that would be mutually enforceable by them.[238] If those two criteria are satisfied, it will not matter that the land was not laid out in lots,[239] or that there were two successor vendors, rather than a single vendor.[240] This more liberal approach has found favour in a Prince Edward Island case,[241] but has been rejected in Ontario.[242]

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[235] Followed, for example, in the following Ontario cases: *Scharf v. Mac's Milk Ltd.*, [1965] 2 O.R. 640, 51 D.L.R. (2d) 565 (C.A.); *McGregor v. Boyd Builders Ltd.*, [1966] 1 O.R. 424, (1965), 54 D.L.R. (2d) 112 (H.C.J.); *Audze v. Township of Innisfil*, [1973] 2 O.R. 228, 33 D.L.R. (3d) 400 (H.C.J.); *Re Lakhani and Weinstein*, *supra*, note 182; *Re Zierler* (1957), 8 D.L.R. (2d) 189 (Ont. H.C.J.); and *Re Wheeler*, *supra*, note 172.

[236] [1908] 2 Ch. 374, at 384, aff'd [1908] 2 Ch. 665, [1908-10] All E.R. Rep. 612 (C.A.) (subsequent reference is to [1908] 2 Ch.). The rules laid down in this case apply *mutatis mutandis* to rental schemes.

[237] That is, the owner of a lot seeking to enforce the restrictive covenant and the owner of a lot against whom he or she seeks enforcement.

[238] Megarry and Wade, *supra*, note 2, at 791-92, and Preston & Newsom, *supra*, note 2, at 62.

[239] *Baxter v. Four Oaks Properties Ltd.*, [1965] Ch. 816, [1965] 1 All E.R. 906.

[240] *Re Dolphin's Conveyance*, [1970] Ch. 654, [1970] 2 All E.R. 664.

[241] *Re Spike and Rocca Group Ltd.* (1979), 107 D.L.R. (3d) 62, 23 Nfld. & P.E.I.R. 493 (P.E.I.S.C.).

[242] *Re Lakhani and Weinstein*, *supra*, note 182.

In *Re Lakhani and Weinstein*,[243] two owners of different parcels of land entered into an agreement with a third party designed to create a residential building scheme over the various parcels of land owned by them. The parties covenanted that they would procure similar covenants from any purchasers and that they themselves would be bound by the restrictions. It was held that while a restrictive covenant was created, there was no building scheme because there was no common vendor.[244]

There is some indication, however, that the situation may be different with a building scheme registered under the land titles system. In *Dorrell v. Mueller*,[245] the plaintiff and the defendant, who owned adjoining properties, had acquired their land from two different vendors. The vendors had taken title to the land comprising the development area on an alternating lot basis, thereby creating a "checkerboard" scheme. The vendors then applied to register certain restrictions on title under the *Land Titles Act*.[246] There was a clear intention to establish a residential (cottage) building scheme. The

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[243] *Ibid*.

[244] See, also, *Re Shortt and Griffin*, *supra*, note 153, at 783, *per* Gale J., which is to the same effect.

[245] (1975), 16 O.R. (2d) 795, 79 D.L.R. (3d) 291 (Dist. Ct.) (subsequent references are to 16 O.R. (2d)).

[246] See now the *Land Titles Act*, *supra*, note 118, s. 118, which provides, in part, as follows:

> 118.—(1) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a condition or restriction that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other condition or restriction running with or capable of being legally annexed to land.
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> ....
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> (3) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a covenant that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other covenant running with or capable of being legally annexed to land.
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> (4) A covenant shall not be registered under subsection (3) unless,
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> (a) the covenantor is the owner of the land to be burdened by the covenant;
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> (b) the covenantee is a person other than the covenantor;
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> (c) the covenantee owns land to be benefitted by the covenant and that land is mentioned in the covenant; and
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> (d) the covenantor signs the application to assume the burden of the covenant.
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> (5) The first owner and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition or covenant, but any such condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant.

court noted[247] that, at common law, a common vendor was essential because it was a question of fact to be decided whether the restrictions were for the vendor's own benefit, or for the common benefit of all the purchasers. However, it was held that this was no longer a factor to be considered, provided the statutory requirements had been fulfilled.[248] Prior amendments to the Act[249] were said to be for the very purpose of enabling developers to annex covenants to land that would be for the mutual benefit of, and would restrain, all purchasers within a specific development.[250] Once the restrictions were registered under the statute, succeeding owners were held to be bound as if the person who owned the land when the restrictions were imposed had covenanted with subsequent owners individually.[251] Therefore, the effect of the statute was to enable any owner or owners to register such restrictions for the mutual benefit of all the lots. While this argument may not be definitive, the result is salutary.

The requirement that the area of the building scheme must be defined with specificity is concerned with the question of notice. Thus, in *Reid v. Bickerstaff*, Cozens-Hardy M.R. said:[252]

> [T]here must be a defined area within which the scheme is operative....A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area.

> (6) The entry on the register of a condition or covenant as running with or annexed to land does not make it run with the land, if such covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land.
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> ....
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> (10) Where a condition or restriction has been registered as annexed to land, the condition or restriction is as binding upon any person who becomes the registered owner of the land or a part thereof as if the condition or restriction had been in the form of a covenant entered into by the person who was the registered owner of the land at the time of the registration of the condition or restriction.

247 *Dorrell v. Mueller*, *supra*, note 245, at 808.

248 *Ibid.*

249 Section 122 of the *Land Titles Act*, R.S.O. 1960, c. 204, was amended by S.O. 1961-62, c. 70, s. 32, which repealed the original subsec. (1) and added subsecs. (1), (2), (3), (4), (9), and (10) of s. 118 of the current *Land Titles Act*, reproduced, in part, *supra*, note 246.

250 *Dorrell v. Mueller*, *supra*, note 245, at 807-08.

251 *Ibid.*, at 808.

252 *Supra*, note 208, at 319. See, also, *Shen Investments Ltd. v. Mosca*, [1968] 2 O.R. 162, 68 D.L.R. (2d) 372 (H.C.J.), and *Scharf v. Mac's Milk Ltd.*, *supra*, note 235.

Thus, in *McGregor v. Boyd Builders Ltd.*[253] it was alleged that a building scheme had been created, but there was no evidence that the purchasers had had access to a plan delimiting the area. While certain advertisements had described the general area, the deeds did not refer specifically to the benefited lands. Accordingly, the court held that the restrictions were not enforceable, and that extrinsic evidence could not be used to prove the existence of the plan or its area; such evidence could be used only to explain an ambiguity.[254] It follows that, if the dominant lands have not been described, it will not matter that the vendor had an intention to create a building scheme, or that the original purchasers were aware of that intention. Anyone dealing subsequently with the land must be able to discover the existence of the scheme from the public record.[255]

Building schemes, like restrictive covenants generally, are subject to the recording statutes. Hence, the specificity required by these statutes will ensure that notice will be given to all owners under a scheme.[256]

With respect to the intention to establish a scheme, it must first be shown, as for all restrictive covenants, that there was an intention that the covenant bind, and run with, the land.[257] It is not necessary, however, to show an express contract between the vendor and the several purchasers. If the purchasers of lots on a plan have notice of facts leading to the conclusion that the subdivider intended that certain restrictions should be for the benefit of all the lots, it may be inferred that each purchaser bought his or her lot on that understanding.[258] If mutual obligations with respect to restrictions on use are clearly intended between a landowner and the purchasers of portions of her land, the scheme will be enforced.[259] Moreover, the reservation by the vendor of a power to release all or part of the land from the restrictions will not affect the creation of a scheme.[260]

In *Re Lorne Park*,[261] a company was incorporated to develop a summer resort. A common form deed was used for the sale of all lots in which the

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253 *Supra*, note 235, following *Galbraith v. Madawaska Club Ltd.*, *supra*, note 145.

254 See, also, *Re Lorne Park Estates Association and Regional Assessment Commissioner, Region No. 15*, *supra*, note 190, and *Re Pidgeon*, *supra*, note 186.

255 *Shen Investments Ltd. v. Mosca*, *supra*, note 252.

256 The notice provisions of the legislation are discussed *supra*, this ch., sec. 5(b)(v).

257 *Audze v. Township of Innisfil*, *supra*, note 235; *White v. Lauder Developments Ltd.*, *supra*, note 165; and *Harder Homes Ltd. v. Stellar Development Ltd.* (1982), 135 D.L.R. (3d) 737, 25 R.P.R. 52 (Sask. Q.B.).

258 *West v. Hughes*, *supra*, note 177.

259 *Re Seifeddine and Governor & Co. of Adventurers of England Trading Into Hudson's Bay* (1980), 108 D.L.R. (3d) 671, 22 A.R. 111 (C.A.).

260 *Elliston v. Reacher*, *supra*, note 236, at 672.

261 (1914), 33 O.L.R. 51, 22 D.L.R. 350 (App. Div.), aff'g (1913), 30 O.L.R. 289, 18 D.L.R. 595 (H.C. Div.). For a rather inconsistent sequel to this case, see *Re Lorne Park Estates Association and Regional Assessment Commissioner, Region No. 15*, *supra*, note 190.

company covenanted that the purchaser, his heirs, executors, administrators and assigns should have free access to the streets, avenues, terraces and commons of the park. Inducements to this effect had been held out to the purchasers. The park property was sold to the petitioner when the company defaulted on its mortgage. It was held that a building scheme had been established by the following: (1) the incorporation of the company, which indicated clearly that the object and purpose of the company was to establish a building scheme; (2) the terms of the coveyances to the purchasers, which set forth the mutual obligations to accomplish the purpose; and (3) the inducements made to the purchasers. Accordingly, the company and its successors were implicitly bound not to interfere with the purchasers' rights.

It is apparent, therefore, that the courts do not insist upon a clear statement that a building scheme is intended; rather, they will make the necessary inferences from the facts.[262] However, if the building restrictions vary greatly from lot to lot; if there is no evidence of an intention by the developer that the covenants are to be for the benefit of all the purchasers; if some lots are sold without restrictions; and if some lots sold to one purchaser are widely separate from each other, the existence of a building scheme will not be inferred.[263]

Similarly, if there is no evidence of mutuality or reciprocal obligations, a building scheme will not be inferred. Moreover, it has been held in Ontario that, where the vendor is under no obligation, express or implied, to exact similar covenants of other purchasers, there is no mutuality and, accordingly, no development scheme.[264] If it is provided that the vendor shall enforce the covenants on behalf of all the parties, again there is no mutuality and, hence, no scheme.[265] On the other hand, a building scheme may exist even though the scheme comprises only two parcels of land.[266]

If a lot subject to a building scheme is later subdivided, the purchasers of the parts will still be able to enforce the covenants of the scheme, so far as they are applicable, both between themselves and the owners of the other

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[262] See, also, *Scharf v. Mac's Milk Ltd.*, *supra*, note 235, and *West v. Hughes*, *supra*, note 177.

[263] *Re Wheeler*, *supra*, note 172. See, also, *Re Wallace and Bremner*, [1954] O.W.N. 826 (H.C.J.); *Re Keyser and Daniel J. McA'Nulty Realty Co. Ltd.*, *supra*, note 172; and *Audze v. Township of Innisfil*, *supra*, note 235.

[264] *Re Campbell and Cowdy*, *supra*, note 192; *Re Second Church of Christ Scientist and Dods* (1920), 18 O.W.N. 409 (H.C. Div.); *Re Lankin*, [1951] O.W.N. 821 (H.C.J.); and *Re Zierler*, *supra*, note 235. It has been held in England, however, that a statement in a deed to the effect that the restrictions are not binding on the vendor and that they may be varied by him are not inconsistent with the existence of a building scheme: *Re 6, 8, 10 and 12 Elm Avenue, New Milton, ex parte New Forest District Council*, [1984] 1 W.L.R. 1398, [1984] 3 All E.R. 632 (Ch.D.).

[265] *White v. Bijou Mansions Ltd.*, [1938] Ch. 351, at 363, [1938] 1 All E.R. 546 (C.A.).

[266] *Re Rowan and Eaton*, *supra*, note 63.

lots.[267] Indeed, they may themselves enter into a sub-scheme with respect to the subdivided lots without affecting the enforceability of the main building scheme.[268]

If two lots among others subject to a building scheme come into common ownership, but are severed once again at a later date, the covenants remain operative because they are still subject to the local law.[269] However, if the owners of lots comprising a building scheme seek to modify it by releasing the covenants and substituting others, it has been held that the scheme will be discharged, although it was suggested that the new restrictions might have been treated as merely modifying the existing scheme if they had been expressed to be supplemental to the prior conveyances.[270]

Finally, we should note that a grantee who takes subject to a development scheme, like a grantee who takes subject to a restrictive covenant generally, is bound by it even though she did not execute the conveyance, because equity regards the covenant as part of the transaction in which the grantee acquired the land.[271]

(d) Remedies

In the context of freehold land, a restrictive covenant is enforceable against an assignee of the covenantor only in equity. In these circumstances, therefore, only equitable remedies will be available for their enforcement.[272]

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[267] *Brunner v. Greenslade*, *supra*, note 234.

[268] *Ibid.*

[269] *Ibid.*, and *Texaco Antilles Ltd. v. Kernochan*, [1973] A.C. 609, [1973] 2 All E.R. 118 (P.C.). By contrast, if land subject to a restrictive covenant *simpliciter* and the dominant land come into common ownership, the covenant is thereby discharged. Extinguishment by unity of ownership is discussed *infra*, this ch., sec. 5(e)(i).

[270] *Re Pinewood Estate, Farnborough*, *supra*, note 222. But see Comment, [1957] C.L.J. 146.

[271] *Re Rowan and Eaton*, *supra*, note 63; *Re Wheeler*, *supra*, note 172; *Gilpinville Ltd. v. Dumaresq*, [1927] 1 D.L.R. 730 (N.S.S.C.); and *Elliston v. Reacher*, *supra*, note 236.

[272] Although restrictive covenants are ordinarily enforced in equity, they are enforceable at law in the following circumstances:

(a) between the original parties, since there is privity of contract;

(b) by a successor of the covenantee against the original covenantor, since the benefit of a covenant (whether positive or restrictive) may run with the land at law;

(c) by an assignee of the benefit from the covenantee, against the original covenantor, since, like any chose in action, the benefit of a covenant can be assigned expressly; and

(d) by the original covenantee or successor against the successor of the covenantor, where there is privity of estate. See, generally, *supra*, this ch., secs. 1-4.

Normally, a prohibitory injunction will be granted to restrain a breach of a restrictive covenant. However, a mandatory injunction may be awarded in appropriate cases, for example, to require the demolition of a building erected in breach of the covenant.[273] Moreover, the court has the power to grant damages, either in addition to or in substitution for an injunction or an order for specific performance,[274] and the court will exercise this power in appropriate circumstances.[275] Equitable remedies, however, are discretionary and will be refused if it would be inequitable to grant them.

In *Doherty v. Allman*,[276] Lord Cairns was of the following opinion:

> If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made with their eyes open, between themselves.

However, in *Shepherd Homes Ltd. v. Sandham*, Megarry J. disagreed with the notion that a mandatory injunction should be available automatically:[277]

> First, Lord Cairns' statement of principle *prima facie* applies to mandatory injunctions; but it does not apply in its full width. The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a mandatory injunction. Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a 'fair result', and this involves the exercise of a judicial discretion.

The preceding view was followed by Brightman J. in *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd*.[278] In that case, the defendants

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[273] *Wakeham v. Wood* (1981), 43 P. & C.R. 40 (C.A.).

[274] *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 112.

[275] See *Shaw v. Applegate*, [1977] 1 W.L.R. 970, [1978] 1 All E.R. 673 (C.A.).

[276] (1878), 3 App. Cas. 709 (H.L.), at 720.

[277] [1971] Ch. 340, at 351, [1970] 3 All E.R. 402.

[278] [1974] 1 W.L.R. 798, [1974] 2 All E.R. 321 (Ch. D.).

purchased land in a subdivision and proceeded to prepare for the building of fourteen houses in defiance of a restrictive covenant under a building scheme. The defendants had notice of the covenant, which prohibited construction except in accordance with a plan approved by the plaintiff. The plaintiff sought a prohibitory and a mandatory injunction, but did not seek an interlocutory injunction. The defendants continued to build, and at the time of the trial the houses had been completed and sold. Upon a consideration of the following factors, the court held that a mandatory injunction, requiring destruction of the houses, should be denied: (1) no damage of a financial nature had been done to the plaintiff; (2) the breach did not destroy the integrity of the plan; (3) the homes were already occupied; and (4) there was a shortage of housing. As an alternative, the plaintiff was awarded damages.

The *Wrotham* case was followed in *Arbutus Park Estates Ltd. v. Fuller*,[279] a case also involving a building scheme. The restriction in question required the grantee to refrain from commencing construction of a detached garage until the plans and specifications therefor had been approved by the plaintiff. Unaware of the restriction, the defendant grantees began construction without having first obtained the requisite approval. When the garage was seventy-five percent completed, the defendants learned of the restriction, but their request for approval was refused by the plaintiff. The court refused the plaintiff's action for a mandatory injunction requiring the demolition of the garage. The covenant, it was held, did not tell the covenantor clearly what to do or what not to do. In the result, the plaintiff not having sought damages, it was granted only a declaratory order that the defendants were in breach of the covenant.

(e) Extinguishment, Unenforceability, Modification and Discharge, and Expiry of Restrictive Covenants

(i) Extinguishment by Unity of Ownership

If the titles to the dominant and servient lands are acquired by the same person, in the same right, a restrictive covenant is thereby extinguished.[280] Moreover, the restrictive covenant is not revived if, subsequently, the lands are severed again. There is no extinguishment, however, if two or more (but not all) lots in a building scheme come into common ownership.[281]

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[279] (1976), 74 D.L.R. (3d) 257, [1977] 1 W.W.R. 729 (B.C.S.C.).

[280] *Re Tiltwood*, [1978] Ch. 269, [1978] 2 All E.R. 1691.

[281] *Texaco Antilles Ltd. v. Kernochan*, *supra*, note 269.

(ii) Unenforceability

It has been held that a restrictive covenant will be presumed to have been released if the land has been used openly for many years, in a manner inconsistent with the covenant.[282] Similarly, a restrictive covenant will cease to be enforceable if the person entitled to enforce the benefit has disregarded prior breaches of the covenant in such a way as to lead a reasonable person to conclude that future breaches will also be disregarded,[283] or if the covenantees or their successors have acquiesced in a changed use of the property.[284] A restriction will also cease to be enforceable if, by acts of the covenantees, or their successors, or otherwise,[285] the character of the neighbourhood has so changed that it would not be reasonable to enforce it,[286] or if enforcement of the covenant would be useless.[287] Moreover, where there has been a change in the general character of the neighbourhood, such that the restriction has become meaningless and obsolete, and its enforcement is only sought out of spite or caprice, or out of a desire to gain financially from technical but obsolete restrictions, the court will not enforce it. For example, in *Cowan v. Ferguson*,[288] a covenant, imposed more than seventy years earlier, prohibited the operation of a foundry on certain land. It was intended, originally, to prevent competition in respect of a restricted source of water power. When the case was decided, however, the area had become a thriving industrial centre and steam and electrical power had replaced water power. In these circumstances, the court refused to enforce the covenant.

Enforceability, on the other hand, will not be affected if the persons entitled to the benefit of the covenant have failed to enforce it in a few instances, but the original object of preserving the property can still be attained.[289]

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[282] *Hepworth v. Pickles*, [1900] 1 Ch. 108, (1899), 69 L.J. Ch. 55.

[283] *Chatsworth Estates Co. v. Fewell*, [1931] 1 Ch. 224, [1930] All E.R. Rep. 142.

[284] *Sayers v. Collyer* (1884), 28 Ch. D. 103, [1881-85] All E.R. Rep. 385 (C.A.).

[285] *Sobey v. Sainsbury*, [1913] 2 Ch. 513, 88 L.J. Ch. 103; *Cowan v. Ferguson* (1919), 45 O.L.R. 161, 48 D.L.R. 616 (App. Div.); and *Turney v. Lubin*, [1980] 1 W.W.R. 35, 14 B.C.L.R. 329 (S.C.).

[286] *Ramuz v. Leigh-on-Sea Conservative and Unionist Club (Ltd.)* (1915), 31 T.L.R. 174 (Ch.).

[287] *Chatsworth Estates Co. v. Fewell*, *supra*, note 283.

[288] *Supra*, note 285.

[289] *Knight v. Simmonds*, [1896] 2 Ch. 294, 65 L.J. Ch. 583 (C.A.), and *Turney v. Lubin*, *supra*, note 285. See, also, *Re Second Church of Christ Scientist and Dods*, *supra*, note 264.

(iii) Modification and Discharge

The modification and discharge of restrictive covenants[290] is governed by statute. Section 61 of the *Conveyancing and Law of Property Act*[291] provides for the modification or discharge of restrictive covenants affecting land subject to the *Registry Act*,[292] and section 118(5) of the *Land Titles Act*[293] provides for the modification or discharge of restrictive covenants affecting land subject to land titles.

While the *Conveyancing and Law of Property Act*[294] simply authorizes judicial modification or discharge of covenants without providing guidance for the exercise of the court's discretion, section 118(5) of the *Land Titles Act*[295] authorizes modification or discharge only where the court is satisfied that it would be "beneficial to the persons principally interested in the enforcement of the condition or covenant". This requirement was originally contained in *The Conveyancing and Law of Property Act, 1922* provision[296]

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290 The legislation extends not only to building schemes, but to all restrictive covenants. See *Re Button* (1925), 57 O.L.R. 161 (H.C. Div.). The suggestion in *Re Crocker* (1931), 40 O.W.N. 294 (H.C. Div.) that the legislation does not apply to restrictive covenants between neighbours, but only to building schemes, must be regarded as erroneous.

291 *Supra*, note 7. Section 61 provides, in relevant part, as follows:

> 61.—(1) Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of a judge of the Supreme Court or of the judge of the county or district court of the county or district in which the land or any part of it is situate.

By virtue of s. 159 of the *Courts of Justice Act, 1984*, *supra*, note 274, jurisdiction conferred upon a particular county or district court is deemed to be conferred on the District Court sitting in the county or district of the court named.

292 *Supra*, note 117.

293 *Supra*, note 118, reproduced *supra*, note 246.

294 *Supra*, note 7, s. 61(1), reproduced *supra*, note 291.

295 *Supra*, note 118, reproduced *supra*, note 246.

296 S.O. 1922, c. 53. The language of the two provisions was not identical. While the provision contained in *The Conveyancing and Law of Property Act, 1922* empowered a judge to modify or discharge a covenant "on proof to his satisfaction that the modification will be beneficial to the persons principally concerned", the *Land Titles Act* required the modification to be "beneficial to the persons principally interested in the enforcement of the condition or covenant". This difference in statutory language was noted in *Re Speer* (1926), 59 O.L.R. 385, [1926] 4 D.L.R. 492 (H.C. Div.) (subsequent reference is to 59 O.L.R.). In that case it was suggested that the latter provision was to be understood as meaning that "only such persons as are entitled in law to demand enforcement of the condition or covenant are to be considered or consulted, or heard upon an application to have the condition or covenant modified or discharged": *ibid.*, at 386-87. No comment was made, however, as to the meaning of the *Conveyancing and Law of Property Act* provision.

but was deleted in the 1927 statute revision.[297] It has been held, however, that the amendment did not render it easier to obtain a modification or discharge,[298] but rather rendered it more difficult.[299] Essentially the same criteria have been applied whether the case was determined before or after the statutory amendment, and irrespective of whether the case was governed by the *Conveyancing and Law of Property Act* or the *Land Titles Act*.[300]

The scope and purpose of the legislation, it has been held, is "to enable the Court to get rid of a condition or restriction which is spent or so unsuitable as to be of no value and under circumstances when its assertion would be clearly vexatious".[301] Thus, for example, if the person who had the right to enforce the restriction could derive no real benefit from it, as where the covenantee failed to impose similar restrictions on neighbouring lands sold by him, it will be removed.[302]

As a general rule, upon an application for modification or discharge, "the Judge must satisfy himself that the balance of convenience is in favour of granting the application, having regard to the rights and interests of both parties, and...the order should not be made unless the benefit to the applicant greatly exceeds any possible detriment to the respondents".[303]

Further, the phrase "persons principally concerned" has been interpreted to mean those persons who would derive a real or substantial benefit by enforcing the restriction: *Re Button*, *supra*, note 290.

297 *The Conveyancing and Law of Property Act*, R.S.O. 1927, c. 137, s. 57.

298 *Re Crocker*, *supra*, note 290; *Re City of Toronto and Lot 23, Plan M260*, [1945] O.W.N. 723, [1945] 4 D.L.R. 590 (H.C.J.); and *Re Beardmore*, [1935] O.R. 526, [1935] 4 D.L.R. 562 (C.A.).

299 *Ibid*.

300 See *infra*, note 303.

301 *Re Ontario Lime Co. Ltd*. (1926), 59 O.L.R. 646, at 651, [1927] 1 D.L.R. 765 (App. Div.), *per* Middleton J.A. Indeed, if the restriction is spent, there is no need to apply under the legislation for discharge: *Re Bartley and Lumsden Ave.*, [1950] O.W.N. 648, [1950] 3 D.L.R. 705 (C.A.).

302 *Re Button*, *supra*, note 290.

303 *Re George* (1926), 59 O.L.R. 574, at 577-78, [1927] 1 D.L.R. 155 (App. Div.). These considerations have been adopted and applied repeatedly. Although *Re George* was decided under the *Conveyancing and Law of Property Act*, it was subsequently applied in *Re Ontario Lime Co. Ltd.*, *supra*, note 301, a case decided under the *Land Titles Act*. In *Re Crocker*, *supra*, note 290, the same principles were applied in a case arising under the *Conveyancing and Law of Property Act*, after it was amended to delete the requirement that the modification be shown to be beneficial to the persons principally concerned. The principles were also applied in *Re Beardmore*, *supra*, note 298; *Re Long* (1929), 36 O.W.N. 15 (H.C. Div.); *Re City of Toronto and Lot 23, Plan M260*, *supra*, note 298; and *Re Davidson Construction Co. Ltd*. (1929), 36 O.W.N. 91 (H.C. Div.).

While these principles have been applied in several cases to grant the order sought,[304] they have often been applied with the opposite result. For example, the application was unsuccessful where the modification sought would have led to the depreciation of nearby homes,[305] or where it would have tended to alter the character of the neighbourhood.[306] Moreover, a covenant will not be modified or discharged if the neighbourhood still retains its essential character, even though the restrictions are less valuable than they once were,[307] or where the covenant was only recently imposed and the character of the neighbourhood remains essentially the same.[308]

The above principles require the court to balance the competing interests: the first requires a consideration of the balance of convenience, having regard to the rights and interests of both parties; the second requires the court to balance the benefit to the applicant against the detriment to the respondent. In addition to these relative tests, there is an absolute requirement. Even though a considerable benefit might accrue to the applicant, the order will be refused where the detriment to the respondent would be substantial.[309] It is said that because the power conferred by the statute is not expropriatory, insofar as it does not provide for the payment of compensation, an order should not be made if it would operate to the prejudice of an adjacent landowner who has any real rights.[310] Thus, it has been held that the "power ought not to be exercised where the result...would be to interfere with any substantial rights of those interested under the covenant".[311] The judicial decisions make it quite clear that the extraordinary power conferred by the statute is to be exercised with extreme caution,[312] a

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[304] See, for example, *Re Long*, *supra*, note 303, and *Re George*, *supra*, note 303, in which Middleton J.A. concluded that the detriment to those who opposed the application would be infinitesimal when compared to the advantage to the applicant and that the property was of no reasonable use unless relief was obtained.

[305] *Re City of Toronto and Lot 23, Plan M260*, *supra*, note 298, and *Re Dinnick*, [1933] O.W.N. 55 (H.C.J.).

[306] *Re Hewgill*, [1957] O.W.N. 310 (H.C.J.). See, also, *Re Pugh* (1926), 31 O.W.N. 11 (H.C. Div.).

[307] *Chudley v. Buss*, [1980] 1 W.W.R. 478 (Man. C.A.), and *Re Dinnick*, *supra*, note 305.

[308] *Cresswell v. Proctor*, [1968] 1 W.L.R. 906, [1968] 2 All E.R. 682 (C.A.), and *Re Pugh*, *supra*, note 306.

[309] See, for example, *Re Dinnick*, *supra*, note 305.

[310] *Re Ontario Lime Co. Ltd.*, *supra*, note 301.

[311] *Re Howie* (1922), 53 O.L.R. 65, at 67, [1923] 3 D.L.R. 754 (H.C. Div.). See, also, *Re Western Canada Flour Mills Ltd.* (1923), 25 O.W.N. 219 (H.C. Div.); *Re Findley* (1927), 32 O.W.N. 79 (H.C. Div.); and *Re Moody*, [1941] O.W.N. 167, [1941] 3 D.L.R. 768 (C.A.).

[312] See, for example, *Re Baillie* (1911), 2 O.W.N. 816, 18 O.W.R. 642 (H.C.J.); *Re City of Toronto and Lot 23, Plan M260*, *supra*, note 298; *Re Findley*, *supra*, note 311; *Re McMurtry* (1922), 23 O.W.N. 168 (H.C. Div.); *Re Moody*, *supra*, note 311; *Re Ontario Lime Co. Ltd.*, *supra*, note 301; and *Re Western Canada Flour Mills Ltd.*, *supra*, note 311.

concern that has been taken to great lengths.[313] The court has refused to permit a change in a residential neighbourhood, even though it might have been in the public interest to do so.[314]

It would seem that, in order to succeed, an applicant must satisfy the court that if the modification were allowed, the injury to the objecting neighbours would be negligible.[315] In this context, it is clear that "injury" is not restricted to financial injury, but rather may extend to loss of enjoyment of amenities.[316] Where all interested parties have consented, however, the application for modification or discharge has been successful.[317] Thus, in those cases in which the application was granted, it was usually found that there was no building scheme, that there were no serious objections to the application, that all interested parties consented, or that the change would be of very limited or no detriment.[318] Applications to permit the erection of churches in residential neighbourhoods appear to be particularly favoured.[319]

It should be noted that in other jurisdictions the court or other tribunal is given more statutory guidance than is the court in Ontario in determining whether or not to grant an application for modification or discharge. For example, section 31(2) of the British Columbia *Property Law Act*[320] empowers the court to modify or discharge a restrictive covenant if it is satisfied that:

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[313] In *Re Langley* (1929), 37 O.W.N. 87 (H.C. Div.), a majority of owners affected by a building restriction imposing a minimum frontage requirement applied for modification. The restriction had only one more year to run. Nevertheless the modification was refused.

[314] For example, to permit an apartment building in a single-family area because of a housing shortage: *Re Section 51 Land Titles Act (Grieve's Application)*, [1954] 1 D.L.R. 301, (1953), 10 W.W.R. (N.S.) 49 (Alta. S.C.); *Shaughnessy Heights Property Owners' Association v. Campbell*, [1951] 2 D.L.R. 62, 3 W.W.R. (N.S.) 407 (B.C.S.C.); and *Alexander v. Malcheski* (1953), 8 W.W.R. (N.S.) 73, 61 Man. R. 138 (Q.B.), aff'd with variation, 9 W.W.R. (N.S.) 334, 61 Man. R. 145 (C.A.).

[315] *Re Beardmore*, *supra*, note 298.

[316] *Ibid*.

[317] See, for example, *Re Graham* (1922), 23 O.W.N. 413 (H.C. Div.), and *Re Jackson* (1919), 16 O.W.N. 69 (H.C. Div.).

[318] See, for example, *Re George*, *supra*, note 303; *Re Button*, *supra*, note 290; *Re Speer*, *supra*, note 296; *Re Sellers-Gough Fur Co. Ltd.* (1925), 28 O.W.N. 255 (H.C. Div.); *Re Long*, *supra*, note 303; *Re Graham*, *supra*, note 317; and *Re Jackson*, *supra*, note 317.

[319] See *Re St. Timothy's Church* (1930), 39 O.W.N. 93 (H.C. Div.), and *Re Eglinton and Bedford Park Presbyterian Church* (1927), 61 O.L.R. 430, [1928] 1 D.L.R. 354 (H.C. Div.).

[320] *Supra*, note 206. This section is very similar to s. 84(1) of the English *Law of Property Act 1925*, *supra*, note 30. See, also, the following: *Land Titles Act*, R.S.A. 1980, c. L-5, s. 52; *Land Titles Act*, S.N.B. 1981, c. L-1.1, s. 48; and *Land Titles Act*, R.S.P.E.I. 1974, c. L-6, s. 59(5) and (11).

(a) by reason of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete;

(b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled;

(c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled;

(d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; or

(e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

The Alberta *Land Titles Act*,[321] permits the modification or discharge of a covenant where, *inter alia*, (1) it conflicts with a zoning by-law or an official plan, and (2) the modification is in the public interest. It has been held that a conflict exists between a covenant and a zoning by-law only if the by-law requires, rather than merely permits, the type of development prohibited by the covenant.[322]

Although a public interest argument in favour of modification has been rejected in one Ontario case,[323] it would appear that the public interest has provided at least some tacit motivation for the court's decision in other instances.[324] In *Re Sellers-Gough Fur Co. Ltd.*,[325] the applicant proposed to

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[321] *Supra*, note 320, s. 52, subsec. (3) of which provides, in relevant part, as follows:

> 52.—(3) [A]ny such condition or covenant may be modified or discharged by order of the court, on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant or that the condition or covenant conflicts with the provisions of a land use by-law or statutory plan under the *Planning Act*, and the modification or discharge is in the public interest.

A similar provision may be found in the New Brunswick *Land Titles Act*, *supra*, note 320, s. 48. This provision, however, has the additional ground that "the condition or covenant offends public policy or is prohibited by law": s. 48(2)(c).

[322] *Re Section 51 Land Titles Act (Grieve's Application)*, *supra*, note 314, and *Re Seifeddine and Governor & Co. of Adventurers of England Trading Into Hudson's Bay*, *supra*, note 259.

[323] *Re Howie*, *supra*, note 311.

[324] See, for example, *Re Long*, *supra*, note 303, and *Re City of Toronto and Lot 23, Plan M260*, *supra*, note 298. While the public interest was not addressed specifically in these cases, the court did refer to factors of broad public relevance. See, also, *Re Eglinton and Bedford Park Presbyterian Church*, *supra*, note 319, and *Re St. Timothy's Church*, *supra*, note 319.

[325] *Supra*, note 318.

erect an apartment building in a residential neighbourhood. An order was sought modifying or discharging a covenant imposing a requirement that any building be set back thirty feet from the street. Although the order was granted, it was made conditional upon obtaining the consent of the city council. The question whether the building would be an advantage to the neighbours, as the applicant had contended, was thus left to be determined by the city council. Since the order modifying the restriction was granted, albeit conditionally, it seems clear that Mowat J. must have been satisfied that the requirements of the *Conveyancing and Law of Property Act* had been fulfilled. The condition that the approval of city council be obtained may be interpreted as an attempt to add to the statutory provision a requirement that the public interest be considered.

The Ontario legislation has been interpreted by the courts to require service of notice of the application upon all persons who appear by the registry office record or the land titles register to have a legal or equitable interest in the land and the restriction. Moreover, because the municipality may be interested, it should be served and, since other persons, not disclosed by the public records, may be interested, the Attorney General may be served on their behalf.[326] Where the facts indicate the existence of a common building scheme, the common vendor and those claiming title under him should be served.[327]

Finally, it has been held that a purchaser under an agreement of purchase and sale lacks sufficient standing to bring an application for modification or discharge.[328]

(iv) Expiry by Operation of the Recording Statutes

The *Land Titles Act*[329] provides that a registered restriction that is for a fixed period may be deleted from the register at any time after ten years from the expiration of the period.

Until 1979, the Act[330] provided that a restrictive covenant that is not limited as to time could be deleted from the register upon application by any person interested in the land at any time after forty years after registration of the instrument containing the covenant. However, by an amendment in that year,[331] such a covenant is deemed to have expired forty years after registration and may be deleted by the land registrar, presumably without

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[326] *Re McMurtry*, *supra*, note 312.

[327] *Re Baillie*, *supra*, note 312.

[328] *Re Bartley and Lumsden Ave.*, *supra*, note 301.

[329] *Supra*, note 118, s. 118(8).

[330] R.S.O. 1970, c. 234, s. 129(9), enacted by S.O. 1961-62, c. 70, s. 32(2).

[331] *The Land Titles Amendment Act, 1979*, S.O. 1979, c. 93, s. 34. See, now, *Land Titles Act*, *supra*, note 118, s. 118(9).

notice. The effect of this provision is that, subject to the action of the land registrar in deleting the covenant, a restrictive covenant under the land titles system expires automatically after forty years.

The registry system operates differently. Until 1981, a claim to the benefit of a restrictive covenant would expire forty years after its registration, but it would be preserved if it was acknowledged or specifically referred to or contained in an instrument, or if notice of the claim was registered against the burdened land, within those forty years or thereafter, but before any intermediate registrations.[332] By an amendment in 1981[333] the forty year period, now called the "notice period",[334] was retained, but a claim,[335] which would include the benefit of a restrictive covenant, can thereafter be preserved only by registering a notice of claim against the burdened land within the notice period or thereafter, but before registration of a conflicting claim.[336]

(f) Invalid Restrictive Covenants

In this section we consider the question of the invalidity of restrictive covenants by reason of racial or other restrictions. Such covenants were relatively common in Ontario at one time.

In *Re Drummond Wren*,[337] a covenant provided that land was not to be sold to "Jews or persons of objectionable nationality". It was held to be void by MacKay J. as being contrary to public policy, in that it tended to create or deepen divisions between religions and ethnic groups and conflicted with prevailing public opinion. It was also held to be void for uncertainty and as a restraint on alienation.

Regrettably, this enlightened approach was not adopted in *Noble and Wolf v. Alley*.[338] In that case, the lands in question formed part of a summer resort development that had been subdivided by a developer. Each conveyance by the developer to a purchaser contained certain restrictive covenants pursuant to a building scheme. One of these restrictions provided that the lands could not be alienated in any way to, or occupied by, any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, the intention of the grantor being to restrict the use and enjoyment of the development to

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[332] *Registry Act*, *supra*, note 117, ss. 106(1) and 107.

[333] S.O. 1981, c. 17, s. 4, which re-enacted Part III of the Act, entitled "Investigation of Titles".

[334] *Registry Act*, *supra*, note 117, s. 104(1)(c), as am. by S.O. 1981, c. 17, s. 4.

[335] *Ibid.*, s. 104(1)(a), as am. by S.O. 1981, c. 17, s. 4.

[336] *Ibid.*, s. 106, as am. by S.O. 1981, c. 17, s. 4.

[337] [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.J.). See, also, *Re McDougall and Waddell*, [1945] O.W.N. 272, [1945] 2 D.L.R. 244 (H.C.J.), and *Re Bryers & Morris* (1931), 40 O.W.N. 572 (H.C. Div.).

[338] [1951] S.C.R. 64, [1951] 1 D.L.R. 321.

persons of the white or Caucasian race. Noble being the vendor and Wolf, a Jew, being the purchaser, the matter was brought before the court on a vendor and purchaser application. The Supreme Court of Canada declined to deal with the question of public policy. Instead, it held that the covenant, not being restrictive of user, but of transfer, was not a restrictive covenant, but a restraint on alienation. In this particular case, the restraint was void for uncertainty. The effect of the decision is, therefore, that if a restraint on alienation is properly drafted, so that it is certain,[339] it will be effective between the parties, although it cannot run with the land.

Section 22 of the *Conveyancing and Law of Property Act*[340] was enacted shortly before the Supreme Court of Canada's decision in the *Noble* case.[341] It provides:

> 22. Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of race, creed, colour, nationality, ancestry or place of origin of any person is void and of no effect.

However, the section appears to have little meaning in view of the decision in the *Noble* case. A racially restrictive covenant is not, in fact, a restrictive covenant. Rather, it is a restraint on alienation and, if properly drafted, can be effective as between the parties. It would have been more efficacious, therefore, had the Supreme Court of Canada held that such a restriction, no matter how classified, is void as against public policy.[342]

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[339] See, for example, *Re Tuck's Settlement Trusts*, [1978] Ch. 49, at 58, [1978] 1 All E.R. 1047 (C.A.), approving a settlement for a person so long as he remains of the Jewish faith and married to an approved wife. An "approved wife" was defined in the settlement to mean "a wife of Jewish blood by one or both of her parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to the Jewish faith". Any dispute was to be settled by one of two Chief Rabbis in London.

[340] *Supra*, note 7. Compare the British Columbia *Land Title Act*, R.S.B.C. 1979, c. 219, s. 218(1), which provides:

> 218.—(1) A covenant that, directly or indirectly, restricts the sale, ownership, occupation or use of land on account of the race, creed, colour, nationality, ancestry or place of origin of a person, however created, whether before or after the coming into force of this section, is void and of no effect.

This section would seem to be more effective than section 22 of the Ontario Act. See, also, *Law of Property Act*, R.S.M. 1987, c. L90, s. 7(1), which is to the same effect as the Ontario provision.

[341] S.O. 1950, c. 11, s. 1.

[342] See Smout, *supra*, note 2, at 114-16. See, also, Smout, "An Inquiry into the Law on Racial and Religious Restraints on Alienation" (1952), 30 Can. B. Rev. 863, and Brooke-Taylor, "Racial and Religious Restrictive Covenants" (1978), 42 Conv. & Prop. Law. (N.S.) 24.

A decision to this effect, based upon the equality provision in section 15 of the Charter,[343] would not seem likely.[344] However, such covenants may be void under section 3 of the *Human Rights Code, 1981*,[345] which provides that "[e]very person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap".

(g) Restrictive Covenants and Expropriation

There appear to be no Ontario cases concerning the expropriation of land that is subject to a restrictive covenant. However, since a restrictive covenant creates an interest in land, it would seem that the person who has the benefit of the covenant has a claim for compensation for the taking of the interest, or for injurious affection.[346] It has been held in England that the covenantee has a right to claim compensation for injurious affection to her land if the servient tenement is expropriated,[347] or acquired by agreement under the relevant legislation.[348] It has also been held in England that the covenant is not extinguished by an expropriation, and, accordingly, while no action for breach lies in respect of any use made of the land authorized by the expropriation or relevant statute, it does lie for any use not so authorized.[349] It would seem, however, that such would be the case in Ontario only if a limited estate in the servient land were expropriated.[350] Otherwise,

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[343] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

[344] Numerous cases have held that the Charter, *ibid.*, does not regulate private, as opposed to governmental, behaviour. See, for example, *Cat Productions Ltd. v. Macedo* (1985), 5 C.P.R. (3d) 71 (F.C.T.D.); *Re Peg-Win Real Estate Ltd. and Winnipeg Real Estate Board* (1985), 34 Man. R. (2d) 127, 19 D.L.R. (4th) 438 (Q.B.); *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.), leave to appeal to the Supreme Court of Canada refused, 58 O.R. (2d) 274*n*.; *Kohn v. Globerman* (1986), 39 Man. R. (2d) 263, 27 D.L.R. (4th) 583 (C.A.); *Re Bhindi and British Columbia Projectionists Local 348 of International Alliance of Picture Machine Operators of the United States and Canada* (1986), 4 B.C.L.R. (2d) 145, 29 D.L.R. (4th) 47 (B.C.C.A.); and *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

[345] S.O. 1981, c. 53.

[346] See *Expropriations Act*, R.S.O. 1980, c. 148, ss. 1(1)(e), (g), and (k), 13, 16, 18, 21, and 22.

[347] *Long Eaton Recreation Grounds Co. Ltd. v. Midland Railway Co.*, [1902] 2 K.B. 574, 71 L.J.K.B. 837 (C.A.).

[348] *Re 6, 8, 10 and 12 Elm Avenue, New Milton, ex parte New Forest District Council*, *supra*, note 264.

[349] *Marten v. Flight Refuelling Ltd.*, *supra*, note 191. See, also, *Kirby v. School Board for Harrogate*, [1896] 1 Ch. 437, 65 L.J. Ch. 376 (C.A.).

[350] *Expropriations Act*, *supra*, note 346, s. 9(2).

the land, that is, all the interests therein, vests in the expropriating authority upon registration of the plan of expropriation.[351]

In *Halifax v. Vaughan Construction Co. Ltd.*,[352] the defendant covenanted with the plaintiff to construct certain buildings on the land as soon as practically possible and to reconvey to the plaintiff if it did not do so. The defendant negotiated an expropriation in order to avoid its covenant. It was held that the covenant ran with the land and that the plaintiff was entitled to share in the compensation in respect of its interest. The matter having been sent back to the arbitrator on the question of compensation, it was subsequently held[353] that the city had an equitable interest in the land within the meaning of section 1 of the *Expropriation Act*.[354]

In the majority of the American states compensation is paid to the dominant owner when land subject to covenants is expropriated.[355]

(h) Tax Sales

Where land has been sold by a municipality for tax arrears, it used to be the case that the tax deed extinguished restrictive covenants.[356] Clearly, this could cause great inconvenience; it could destroy a neighbourhood subject to restrictive covenants or a building scheme. Accordingly, legislation now provides that a purchaser under a tax deed or notice of vesting takes subject, among other things, to easements and restrictive covenants that run with the land.[357]

(i) Limitation of Actions

Except in the context of covenants for title,[358] the question of the limitation of actions in respect of covenants appears not to have been litigated. Nor does the *Limitations Act*[359] address the question directly. It is

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[351] *Ibid.*, s. 9(1).

[352] (1957), 9 D.L.R. (2d) 431, 41 M.P.R. 19 (N.S.S.C.), rev'd on other grounds, (1958), 12 D.L.R. (2d) 159 (N.S.S.C., App. Div.).

[353] *City of Halifax v. Vaughan Construction Co. Ltd.*, [1961] S.C.R. 715, 30 D.L.R. (2d) 234, rev'g (1960), 25 D.L.R. (2d) 26, 44 M.P.R. 220 (N.S.S.C.).

[354] R.S.N.S. 1954, c. 91. See, also, the Ontario Act, *supra*, note 346, s. 1(1)(g), which defines "land" as including "any estate, term, easement, right or interest in, to, over or affecting land", and para. (h), which defines "owner" to include, *inter alia*, "a person entitled to a limited estate or interest in land".

[355] See Stoebuck, "Condemnation of Rights the Condemnee Holds in Lands of Another" (1970), 56 Iowa L. Rev. 293, at 295 and 301-10.

[356] *Re Hunt and Bell*, *supra*, note 171.

[357] *Municipal Tax Sales Act, 1984*, S.O. 1984, c. 48, s. 9(5).

[358] Discussed *supra*, this ch., sec. 4(b)(iii).

[359] R.S.O. 1980, c. 240.

probable, however, that restrictive covenants are subject to the standard ten year limitation period for actions to recover land.[360] Restrictive covenants are interests in land, and "land" is defined in the Act as including all incorporeal hereditaments and any interest capable of being inherited.[361]

Moreover, it should be noted that former Bill 160,[362] introduced in the Ontario Legislature in 1983 to reform the law of limitations, would have imposed a limitation period of ten years on actions to enforce easements, restrictive covenants and profits.[363]

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[360] *Ibid.*, s. 4.

[361] *Ibid.*, s. 1(c).

[362] *Limitations Act, 1983*, Bill 160, 1983 (32d Leg., 3d Sess.).

[363] *Ibid.*, s. 3(3)8.

CHAPTER 3

APPROACHES TO THE LAW OF COVENANTS IN OTHER JURISDICTIONS

1. SCOPE OF THE CHAPTER

In this chapter, we shall examine a number of approaches to the law of covenants in a variety of jurisdictions. We shall begin with an examination of the proposals made by the English Law Commission,[1] and those made by the New Zealand Property Law and Equity Reform Committee.[2] We shall then consider the legislation enacted relatively recently in Trinidad and Tobago. Finally, we shall consider the American law of covenants and certain private proposals for reform made in the United States.

2. ENGLAND: PROPOSALS FOR REFORM

(a) INTRODUCTION

It will be recalled[3] that in England, as in Ontario, the burden of a positive covenant cannot run with freehold land, either at law or in equity, although it can run at law with a leasehold estate.[4] The benefit of a positive covenant, on the other hand, can run at law with both a leasehold and a freehold estate.[5] By contrast, both the benefit and the burden of a restrictive covenant can run in equity with both a freehold and a leasehold estate. The prohibition against the running of the burden of a positive covenant with freehold land causes a great deal of inconvenience and difficulty, which can be circumvented only by devices of sometimes doubtful validity.[6]

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[1] England, The Law Commission, *Transfer of Land*[:] *The Law of Positive and Restrictive Covenants*, Law Com. No. 127 (1984) (hereinafter referred to as "English Report").

[2] New Zealand, Property Law and Equity Reform Committee, *Report on Positive Covenants Affecting Land* (1985) (hereinafter referred to as "New Zealand Report").

[3] See *supra*, ch. 2, secs. 2 and 4(c)(i).

[4] See *supra*, ch. 2, sec. 3(b).

[5] Indeed, the benefit of any covenant, whether positive or restrictive, can run with the land at law. See *supra*, ch. 2, sec. 4.

[6] These devices are discussed *supra*, ch. 2, sec. 4(c)(ii).

Pressure from the legal profession to address this deficiency in the law of covenants has been of long standing, particularly in England. In 1965, the Committee on Positive Covenants Affecting Land (the "Wilberforce Committee") recommended that the burden of positive covenants should be allowed to run with land.[7] It was felt, however, that such a reform, without a concomitant reform of the law of restrictive covenants—which, in many respects, is technical and uncertain—would be unsatisfactory. Hence, the Law Commission initiated a study into the law of restrictive covenants and presented its report in 1967.[8] This report made a number of recommendations respecting reform of the law of restrictive covenants, but it concluded that a new code should be prepared that would incorporate its recommendations with those of the Wilberforce Committee.[9]

The Law Commission then produced a working paper in which proposals were made to reform the law of positive and restrictive covenants, as well as the law of easements and profits, and various other matters.[10] However, it found that such an approach was too ambitious, and in its final report it limited itself to the law of positive and restrictive covenants.[11]

Since the scope of this Report is limited to positive and restrictive covenants affecting freehold land, in this section we shall consider only the recommendations made in the Law Commission's final report.

The English Law Commission signaled, as the two main defects in the present law, the fact that the burden of positive covenants do not run with the land, and the complexity and uncertainty of the law of restrictive covenants.[12] The Law Commission rejected an approach that would reform the law of positive covenants alone, since the law of restrictive covenants, even if it were straightforward and certain, could not simply be extended to positive covenants. The English Commission concluded that, for two reasons, the law governing restrictive covenants was not suitable for positive covenants.[13] First, while it might be quite appropriate that anyone on the land having notice of a restrictive covenant should be bound by the restriction, it might not be appropriate that everyone with an interest in the land should be bound by a positive covenant, which could well impose an extremely burdensome obligation. Secondly, equitable remedies would be

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[7] United Kingdom, *Report of the Committee on Positive Covenants Affecting Land* (Cmnd. 2719, 1965).

[8] England, The Law Commission, *Transfer of Land*[:] *Report on Restrictive Covenants*, Law Com. No. 11 (1967).

[9] *Ibid.*, at 26.

[10] England, The Law Commission, *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971).

[11] English Report, *supra*, note 1, para. 1.6, at 3.

[12] *Ibid.*, paras. 4.2-4.12, at 28-31. The nature and extent of these defects are discussed *supra*, ch. 2.

[13] English Report, *supra*, note 1, paras. 4.13-4.20, at 31-33.

inadequate for the enforcement of positive covenants. Often, the best means by which to enforce a positive covenant—for example, an obligation to pay a sum of money—is by an award of damages at law.

In the result, the Commission proposed a comprehensive reform of the law of positive and restrictive covenants that would combine the two concepts into a single unified system. It recommended the creation of a new interest in land, referred to as a "land obligation", by means of which positive or negative obligations, or both, may be imposed on one parcel of land, the "servient land", for the benefit of another parcel of land, the "dominant land". Such an obligation would be enforceable by the owners for the time being of the dominant land against the owners for the time being of the servient land.[14] The analogy to the law of easements is apparent and it is generally, although not exclusively, followed in the report.[15]

Such an approach, authorizing the creation of this new interest in land, would have obvious benefits for landowners who are neighbours. However, the benefits would be even greater within the broader context of development schemes, where the ability to enforce both positive and restrictive obligations would be highly advantageous.

Since England does not have specific condominium legislation, the Law Commission proposals become rather complex in order to extend its recommendations to provide for freehold flat and townhouse schemes. It is, perhaps, to be regretted that the Law Commission did not recommend the adoption of condominium legislation, and thereby enable the remainder of its proposals to remain relatively uncomplicated. Since Ontario has specific condominium legislation, which provides for the running of positive and negative obligations, it might have been thought convenient to consider only those aspects of the Law Commission's recommendations that concern the law of covenants *per se*. However, the recommendations are not always easy to separate. Moreover, some aspects of what the English Commission refers to as a "development scheme", which imposes a special type of land obligation, will be of use in respect of building and rental schemes.

The following is a summary of the scheme proposed by the Law Commission.

(b) The Land Obligation

The Commission proposed that the new land obligation should be one of two types, that is, a "neighbour obligation" or a "development obligation". A neighbour obligation is intended to operate between two or more neighbours, for example, upon the sale of part of one's land to another, or

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[14] *Ibid.*, para. 4.21, at 33.

[15] *Ibid.*, para. 5.4, at 37.

upon the division of a house into two units.[16] The following types of obligation would be capable of being imposed as a neighbour obligation:[17]

Restrictive

1. An obligation imposing a restriction which benefits the whole or part of the dominant land on the doing of some act on the servient land.

Positive

2. An obligation requiring the carrying out on the servient land or the dominant land of works which benefit the whole or any part of the dominant land.

3. An obligation requiring the provision of services for the benefit of the whole or any part of the dominant land.

Reciprocal payment

4. An obligation requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with an obligation falling within paragraph 2 or 3 above.

The first type of obligation described above is comparable to existing restrictive covenants. The second and third types are new positive obligations, which might be used, for example, to maintain a boundary wall (the second type) or to provide heating or insurance coverage (the third type). The fourth type of obligation arises where a positive obligation has been imposed that is in reality for the benefit of both parties. In these circumstances, one party might assume the obligation, for example, to maintain a boundary wall, while the other party agrees to pay a portion of the cost.[18]

While development obligations are designed to be used primarily in circumstances in which a parcel of land is to be divided into individually owned units, including freehold flat and townhouse developments,[19] they can also be used for the "clubbing together" of existing landowners or for leasehold developments.[20] Development obligations differ from neighbour obligations in that enforcement of a development obligation is not restricted to the owner of the dominant land for the benefit of which the obligation was imposed. Indeed, in the case of development obligations, the notion of

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[16] *Ibid.*, para. 6.19, at 42-43.

[17] *Ibid.*, para. 27.1, at 162-63. See, also, *ibid.*, para. 6.6, at 38-39.

[18] *Ibid.*, para. 6.6, at 39.

[19] *Ibid.*, para. 6.7, at 39.

[20] *Ibid.*, paras. 7.69-7.76, at 58-59.

the dominant land is replaced by the broader notion of the "development land". Thus, development obligations may be enforced either by the owners for the time being of part of the development land, or by a "manager" on their behalf.[21] On the other hand, each unit upon which a development obligation is imposed will be the servient land in respect of that particular obligation.[22]

Development obligations are also wider in scope than neighbour obligations. The Law Commission recommended that the following obligations should be capable of being imposed as development obligations:[23]

Restrictive

1. An obligation imposing a restriction which benefits the whole or part of the development land on the doing of some act on the servient land or any other part of the development land.

Positive

2. An obligation requiring the carrying out on the servient land or any other part of the development land of works which benefit the whole or any part of the development land.

3. An obligation requiring the provision of services for the benefit of the whole or any part of the development land.

4. An obligation requiring the servient land to be used in a particular way which benefits the whole or any part of the development land.

Reciprocal payment

5. An obligation requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with an obligation falling within paragraph 2 or 3 above.

Reimbursement

6. An obligation requiring the making of payments to the manager of a development scheme in respect of expenditure incurred or to be incurred in the provision of works or services provided by him in pursuance of the scheme.

7. An obligation requiring the making of payments to the manager of a development scheme by way of contribution towards fees, costs or expenses charged or incurred by him in discharging his functions under

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[21] *Ibid.*, para. 6.9, at 39.

[22] *Ibid.*, para. 6.8, at 39.

[23] *Ibid.*, para. 27.1, at 163. See, also, *ibid.*, para. 6.10, at 40.

the scheme, which costs and expenses may include costs or expenses incurred in accordance with the scheme in connection with any application (whether made by the manager or another) to the court or the Lands Tribunal under any provision of this Act.

Access

8. An obligation requiring access to the servient land to be afforded, in such circumstances and for such purposes as may be specified, to the manager, to any servant or agent of his or to any other person authorised in writing by him.

The first, second, third, and fifth types of obligation above are virtually identical to the types of neighbour obligations described earlier. The fourth type is a positive obligation necessary in a development scheme to ensure not that the property is not used in a way that is detrimental to the scheme (which could be accomplished by restrictive obligation), but to impose a positive obligation that it be used in a way that is beneficial to it.[24] The sixth and seventh types of development obligation are used in situations in which a manager of the development land is employed. The eighth type is also designed for that purpose. While rights of access can be obtained by easement in other situations, a manager is not likely to own land for the benefit of which an easement may be imposed. Since the use of an easement is unavailable, the right had to be provided for expressly.[25]

The English Commission further recommended that a variety of supplementary provisions, which would enhance the enforcement of a land obligation, should be permitted to take effect as part of the land obligation.[26]

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[24] *Ibid.*, para. 6.12, at 41.

[25] *Ibid.*, paras. 6.13-6.14, at 41.

[26] *Ibid.*, para. 27.1(6), at 164, which lists the following types of supplementary provision:

(a) *Information*. A provision giving a right to information (for example, as to the current ownership of the servient land) or to the production of documents (for example, those dealing with changes in its ownership).

(b) *Inspection*. A provision enabling any person entitled to enforce a land obligation to inspect the servient land in order to see whether it has been complied with.

(c) *Self-help*. A provision enabling anyone entitled to enforce a land obligation requiring the carrying out of works to enter the servient land and carry them out himself in the event of non-compliance....

(d) *Fund*. A provision relating to the keeping of a fund out of which expenditure on the carrying out of works, or the provision of services, is to be met. A provision of this kind should be capable of being made whenever a works or services obligation is coupled with a reciprocal payment obligation, and of taking effect as part of either obligation.

(c) Development Schemes

The Law Commission recommended that development obligations should be created only under a pre-existing development scheme and that the scheme should be contained in a deed executed by the makers. It also recommended that the scheme should make provision for a system of development obligations to be imposed upon the "development land", which has been, or is to be, divided into two or more units, although provision may be made for different obligations to be imposed on different units or for some units to be free of obligation. Further, the development land, which must lie in one locality, but all parts of which need not be contiguous to each other, should be defined with some specificity.[27]

In addition, the scheme may make provision for a manager, who might be given the power to enforce the development obligations, and who might be made subject to obligations, enforceable by the unit owners. Provisions may also be made for a change in managers, a right of enforcement of development obligations by the individual unit owners, the imposition of obligations on the maker of the scheme, the arbitration of differences, and the variation and extinguishment of the scheme.[28]

We have already noted that development schemes may be used not only for building and rental developments but also for the "clubbing together" of existing landowners.[29]

(d) The Creation of Land Obligations

The Law Commission recommended that land obligations should subsist either as legal or equitable interests in land, depending upon whether they meet the statutory requirements in that regard.[30] However, only a person who has a legal interest in land should be permitted to create a land obligation. Ordinarily, the obligation must be created by deed or, if it is an

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(e) *Interest*. A provision requiring the payment of interest if default is made in complying with a reciprocal payment or reimbursement obligation.

(f) *Charge*. A provision imposing a charge on the servient land for certain money which becomes due as a result of the non-performance of a reciprocal payment or reimbursement obligation or of an obligation requiring the carrying out of works. . . .

See, also, *ibid*., para. 6.16, at 42.

[27] *Ibid*., paras. 7.4-7.11, at 44-45.

[28] See, generally, *ibid*., paras. 7.16-7.65, at 46-57.

[29] See *supra*, text accompanying note 20.

[30] English Report, *supra*, note 1, paras. 5.2 and 8.2-8.5, at 37 and 60.

equitable interest, by instrument in writing.[31] However, it can also be created under a specifically enforceable agreement to create a land obligation, or under a statutory power to create such an obligation.[32] Further, contingent land obligations are not to be subject to the rule against perpetuities.[33]

The English Commission further recommended that the instrument creating a land obligation should state that the obligation is a land obligation, that it should describe the servient land with specificity, and that it should identify, expressly or impliedly, the legal estate in the servient land that permits the maker to create it.[34] An instrument creating a neighbour obligation should, in addition, describe the dominant land with particularity and identify, expressly or by implication, the legal estate in the dominant land the owner of which is entitled to enforce the obligation.[35] An instrument creating a development obligation, on the other hand, must identify the development scheme under which it is imposed,[36] it being the intention that the creation of the scheme itself does not impose development obligations, but rather enables them to be imposed.[37]

(e) Registration

It was recommended that land obligations should be registrable and that registration should be required for subsequent purchasers to be bound by the obligation.[38] In the case of unregistered land, land obligations must be entered under the *Land Charges Act 1972*[39] as a land charge.[40] In the case of registered land, a land obligation would be registered in the same way as an easement, although it could not be an overriding interest. Hence, a neighbour obligation would be shown on the register for both the dominant and servient land.[41] Development obligations, on the other hand, would be noted only on the register for the servient land.[42]

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[31] *Ibid.*, paras. 8.7-8.10, at 60-61.

[32] *Ibid.*, paras. 8.27-8.30, at 64-65.

[33] *Ibid.*, para. 8.34, at 66.

[34] *Ibid.*, paras. 8.12-8.19, at 62-63.

[35] *Ibid.*, paras. 8.20-8.24, at 63-64.

[36] *Ibid.*, para. 8.25, at 64.

[37] *Ibid.*, para. 7.6, at 44.

[38] *Ibid.*, para. 9.1, at 67.

[39] C. 61 (U.K.).

[40] English Report, *supra*, note 1, paras. 9.4-9.6, at 67-68. There is no comparable system in Ontario, where land is registered either under the registry or land titles system.

[41] *Ibid.*, paras. 9.7-9.19, at 68-71.

[42] *Ibid.*, paras. 9.20-9.24, at 71-72.

(f) The Running of the Benefit

The English Report recommended that a neighbour obligation should be appurtenant, *not* to the land, but rather to the estate in the dominant land that it benefits (the "benefiting estate").[43] Thus, the benefit would run to any person who is a successor in title to the benefiting estate in all or part of the dominant land or to any person who claims through or under such a person. The notion of a "benefiting estate" is a critical feature of the Law Commission proposals. Since a land obligation would be appurtenant, not to the land itself, but rather to an estate in the land, and since, in most cases, land obligations are created by the owners of the freehold, ordinarily the obligation would be appurtenant to the freehold. However, it might be appurtenant, for example, to a leasehold estate, in which event the benefit should pass with that estate only.[44]

The benefit of a development obligation, on the other hand, would pass as provided in the development scheme. Thus, a development obligation might be enforceable by the following: the manager; all of the owners of the units, if it is for the benefit of the development land as a whole; or the owners of those units for whose benefit it was imposed.[45]

(g) The Running of the Burden

It was recommended that restrictive and access obligations should bind all owners of any estate or interest in all or part of the servient land and anyone who occupies all or part of that land.[46] With respect to other land obligations, however, it was recommended that they should bind only the following: (1) freeholders with a right to possession of all or any part of the servient land; (2) leaseholders with a similar right for a term of more than twenty-one years; (3) owners of the burdened estate in all or part of the servient land; and (4) mortgagees of all or part of the servient land.[47] This distinction between the two types of obligation derives from the conclusion that it would be unfair to impose onerous burdens upon someone with only a limited interest in, or right to occupy, the servient land.[48]

The foregoing recommendations were subject to three exceptions. The Law Commission suggested that a land obligation should not bind the following: (1) a person whose interest in the servient land has priority over the land obligation, or any occupier taking under such a person; (2) successors of the maker of the obligation, where the instrument creating the

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[43] *Ibid.*, paras. 10.2-10.6, at 74-75.

[44] *Ibid.*, paras. 8.23-8.24 and 10.3, at 64 and 74.

[45] *Ibid.*, paras. 10.7-10.14, at 76-77.

[46] *Ibid.*, paras. 11.6-11.7, at 78-79.

[47] *Ibid.*, paras. 11.8-11.13, at 79-80.

[48] *Ibid.*, para. 11.8, at 79.

obligation is not registered and the successors gave value for their interests, as well as any subsequent owner, by reason of the doctrine of sheltering; and (3) anyone who, by the terms of the instrument creating the land obligation, is not to be bound thereby.[49] A manager, however, would be deemed to have acquired the benefit of development obligations enforceable by him, for value, upon their creation.[50]

Under the Law Commission proposals, an adverse possessor would be bound by a land obligation, whether or not she has completed the requisite number of years in possession to acquire a possessory title valid against the dispossessed owner.[51]

The creator of the obligation, of course, would be bound by the obligation in any event, but, in a departure from existing law, the Law Commission recommended that he should cease to be bound once he parts with his interest in the servient land, although he might, by personal covenant, continue to be bound.[52]

(h) Liability for Particular Contraventions

The English Report recommended that, subject to a contrary provision in the instrument creating the land obligation,[53] the contravention of a positive, reciprocal payment, or reimbursement obligation should be actionable against every person bound by it at the time of the breach. A restrictive or access obligation, on the other hand, should be enforceable only against a person who, being bound by the obligation, breached it by any act or omission, including an act or omission of his employees and agents. A mortgagor, however, would not be liable for breach of a land obligation unless she has gone into possession herself or through a receiver.[54]

In accordance with the English proposals, the owner of the relevant estate in the servient land would not be liable for contraventions that occurred after he had parted with the estate, but he would continue to be liable for those contraventions that occurred during his ownership. Moreover, the new owner would also be liable for breaches that occurred before he acquired title, but which continued thereafter.[55]

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[49] *Ibid.*, paras. 11.14-11.25, at 80-82.

[50] *Ibid.*, para. 11.27, at 83.

[51] *Ibid.*, paras. 11.28-11.31, at 83-84.

[52] *Ibid.*, paras. 11.32-11.34, at 84-85.

[53] *Ibid.*, para. 12.14, at 89.

[54] *Ibid.*, paras. 12.2-12.8, at 86-87.

[55] *Ibid.*, paras. 12.9-12.13, at 87-88.

(i) Remedies for Contravention

The Law Commission recommended that the following remedies should be available[56] for a contravention of a land obligation:

(a) proceedings for an injunction, including a mandatory injunction;

(b) proceedings for other equitable relief;

(c) actions for moneys due under the obligation; and

(d) actions for damages.

Moreover, it recommended that proceedings for an injunction should be available for a threatened contravention of a land obligation. However, it did not recommend a right of re-entry upon the servient land.[57] Proceedings for an injunction and other equitable relief, of course, are carry-overs from the law of restrictive covenants, whereas the other remedies are required for the enforcement of positive obligations.

Moreover, the remedies would not be available unless the plaintiff was materially prejudiced by the contravention.[58] In addition, common law damages would be available for contravention of restrictive and access obligations only against the owner of the burdened estate, a mortgagee, or a person who has a possessory estate, either freehold or leasehold, for a term exceeding twenty-one years in the servient land. To give a right to damages against someone who had a lesser estate was regarded as oppressive.[59]

The English Report also recommended that a person who was entitled to enforce an obligation should be given a self-help remedy in cases in which the contravention consisted of a failure to carry out certain obligations. That person could then perform the obligation herself and recover the cost, to the extent that the other person was liable for it. However, the Report did not propose to confer a statutory right of entry on the servient land for this purpose; rather, it preferred that such a right be reserved on the creation of the obligation. The Law Commission made it clear, however, that failure to avail oneself of the self-help remedy should not result in the reduction of damages, under the mitigation principle, in an action for damages for breach of the obligation.[60] On the other hand, if a person suffers loss partly

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[56] The limitation period would be six years from the time of the contravention. See *ibid.*, paras. 13.33-13.38, at 96-97.

[57] *Ibid.*, paras. 13.9 and 13.13, at 91 and 92.

[58] *Ibid.*, paras. 13.21-13.23, at 94.

[59] *Ibid.*, paras. 13.24-13.27, at 94-95.

[60] *Ibid.*, paras. 13.28-13.31, at 95-96.

through his own fault, contributory negligence and fatal accident legislation would apply.[61]

To enable a person to discover who is liable for a contravention, recommendations were made that would permit a person entitled to enforce a land obligation to discover the necessary information by service of a notice on anyone in occupation of, or having an interest in, the servient land, or anyone who is in receipt of rent for the servient land.[62]

Finally, it was further recommended that the parties should be able to restrict a person's liability for contravention.[63]

(j) The Charge

Having recommended that, as a supplementary provision to a land obligation, a charge may be imposed on the servient land for money that becomes due by reason of the non-performance of a reciprocal payment or reimbursement obligation, or of an obligation that requires the carrying out of work,[64] the English Commission recommended that the charge should bind every estate or interest in the servient land that is for the time being bound by the obligation.[65] The charge would be enforceable by the person who is entitled to enforce the obligation, in the same manner as a legal mortgage, but only with leave of the court, and upon such terms as the court may impose, including the protection of derivative interests.[66] Such a charge, however, would not have to be separately registered.[67]

(k) Extinguishment and Variation

A land obligation could be varied or extinguished in accordance with its terms, or by agreement.[68] However, the Law Commission also made a number of specific recommendations in this regard.

(i) Extinguishment by Common Ownership

If the burdened estate in the whole of the servient land subject to a neighbour obligation and the benefited estate in the whole of the dominant

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[61] *Ibid.*, para. 13.32, at 96.

[62] *Ibid.*, paras. 13.39-13.44, at 97-99.

[63] *Ibid.*, paras. 13.16-13.17, at 92.

[64] *Ibid.*, para. 6.16(f), at 42.

[65] *Ibid.*, para. 14.14, at 102.

[66] *Ibid.*, paras. 14.17-14.23, at 103-04.

[67] *Ibid.*, paras. 14.15-14.16, at 102-03.

[68] *Ibid.*, paras. 15.1-15.4, at 105.

land come into ownership by the same person in the same right, and if no one else has the benefit or is subject to the burden of the land obligation, the obligation would be extinguished. On the other hand, if not all of the lands come into common ownership, there would be no extinguishment. Finally, if all of the dominant land and part of the servient land come into common ownership, *restrictive* neighbour obligations would be extinguished to the extent that they relate to the part of the servient land that came into common ownership. Other obligations would not be extinguished in the latter situation, since the whole of the servient land is security for their performance and the owner of any part, if called upon to perform, should be able to seek contribution from the owners of the other parts.[69]

Development obligations, on the other hand, would not be extinguished merely because of the subsequent unity of ownership of two or more units. An obligation would be extinguished only if the legal estates of all units come into common ownership and no one else, except the manager, has the benefit of, or is bound by, the obligation. Moreover, in the latter situation the development scheme itself would also be extinguished.[70]

Rights accrued at the time of the extinguishment of a land obligation or of a development scheme would not be affected thereby.[71]

If a land obligation binds only a leasehold estate, and if the lease is surrendered or merged with the reversion, the owner of the leasehold and the reversion would be bound by the obligation for the balance of the term of the lease, although this would not occur if the lease is forfeited.[72]

(ii) Equitable Variations

A legal variation of a land obligation, including an apportionment or a release thereof,[73] occurs if all servient and all dominant owners execute an

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[69] *Ibid.*, paras. 16.6-16.11, at 107-08.

[70] *Ibid.*, paras. 16.12-16.13, at 108-09.

[71] *Ibid.*, para. 16.14, at 109.

[72] *Ibid.*, paras. 16.16-16.20, at 109-10.

[73] In the following examples, which are provided in the English Report, *ibid.*, para. 17.3, at 111, example (a) would constitute an apportionment, and example (b) would constitute a release:

(a) Servient land with the burden of a land obligation to maintain the whole of a wall is divided into two parts, each containing one section of the wall. It is desired that the owner of each part shall be not liable for any non-maintenance of the section of wall which is not on his land.

(b) Servient land similarly burdened is divided into two parts, one of which does not contain any of the wall. It is desired that the owner of that part shall not be liable for any non-maintenance at all.

appropriate instrument to that effect. An equitable variation occurs if not all interested parties consent. In the latter case, it was recommended that those who join in the variation, and their successors, should be bound in equity, but the successors should be bound only if, at the time the variation was entered into, the original party has or will have an interest in the land affected, or is the manager of a development scheme.[74]

(iii) Extinguishment and Variation by the Lands Tribunal

The Lands Tribunal, at present, has powers of variation and extinguishment under the *Law of Property Act 1925*.[75] The basic scheme of this provision would be retained, but, as a result of the major reforms proposed by the Law Commission, and because the current provision is limited to restrictive covenants, it would be extended by the English proposals.

It was recommended that the Tribunal should have power to extinguish or modify any land obligation, to modify a development scheme, and to extinguish a development scheme if all the land obligations thereunder have been extinguished.[76] The Tribunal would also have power to impose terms, including the addition of new provisions and new land obligations, and power to order payment of compensation by the beneficiaries of the order to anyone bound by it, except a manager, who suffers loss or disadvantage. New obligations, however, would only be imposed with the consent of those to be bound by them.[77]

Anyone interested in all or part of the servient land, and a manager under a development scheme, would be able to apply to the Tribunal for modification or extinguishment of a land obligation or development scheme.[78] Certain land obligations, however, would be beyond the Tribunal's powers, for example, those created for military or civil aviation purposes.[79]

The Law Commission proposed the following grounds for the exercise of the Tribunal's powers, each of which is preceded by a statement of the types of obligation or provision to which it applies:[80]

(a) All land obligations and managers' obligations: that the obligation in question is obsolete.

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[74] *Ibid.*, paras. 17.1-17.20, at 111-15.

[75] 15 & 16 Geo. 5, c. 20, as am. by *Law of Property Act 1969*, c. 59 (U.K.), s. 28.

[76] English Report, *supra*, note 1, paras. 18.4-18.6, at 117-18.

[77] *Ibid.*, paras. 18.12-18.25, at 119-22.

[78] *Ibid.*, paras. 18.8-18.11, at 118-19.

[79] *Ibid.*, paras. 18.29-18.31, at 123-24.

[80] *Ibid.*, para. 27.1(75), at 177-78. See, also, *ibid.*, paras. 18.32-18.53, at 124-26.

(b) All land obligations and managers' obligations: that the proposed change is harmless.

(c) All land obligations and managers' obligations: that those concerned have expressly or impliedly agreed to the change.

(d) Development obligations, managers' obligations, and other provisions of development schemes (but not makers' obligations): that the proposed change would remove a factor which is prejudicing the general purposes of the scheme.

(e) Restrictive, access and positive land obligations: that the change is necessary to prevent the obligation impeding some reasonable use of the servient land.

(f) Positive obligations and managers' obligations: that because of a change of circumstances performance of the obligation is no longer practicable or has become disproportionately expensive.

(g) All provisions of development schemes (other than managers' and makers' obligations): that a change of circumstances has made the provision obsolete, or impracticable or disproportionately expensive to implement.

(h) All provisions of development schemes, all development obligations and neighbour obligations which are reciprocal payment obligations: that a change is made necessary by an order of the Tribunal made on any of the other grounds.

In deciding whether a restrictive, positive or access obligation should be extinguished or modified on any ground, or whether any land obligation impedes reasonable user of the land, it was proposed that the Tribunal should have regard to planning and other material factors.[81] Moreover, in deciding whether to modify a provision of a development scheme, it should have regard to the effect of the change on the development land as a whole and on the general purposes of the scheme.[82]

(I) Jurisdiction of the Court

It was proposed to continue and extend the power of the court under section 84 of the *Law of Property Act 1925*[83] to declare whether any land is or may be affected by a land obligation or development scheme and the nature and extent of the obligations and their enforceability.[84]

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[81] *Ibid.*, paras. 18.55-18.56, at 127.

[82] *Ibid.*, para. 18.57, at 127.

[83] *Supra*, note 75.

[84] English Report, *supra*, note 1, paras. 19.2-19.4, at 128.

In addition, it was proposed that the court should have the power to replace a manager or fill a managership vacancy and give such directions as are necessary to transfer the manager's property, rights and liabilities.[85] The court would also have supervisory powers over the Lands Tribunal and would be empowered to exercise the Tribunal's jurisdiction in appropriate cases.[86] The court would have power to approve development schemes for existing freehold flats where not all interested parties consent.[87]

Finally, the Law Commission did not express a final view on the respective jurisdiction that should reside in the High Court and the county courts in these matters.[88]

(m) Related Matters

It was recommended that the Lord Chancellor should be given power to publish model instruments respecting land obligations and development schemes, although use of such forms would not be compulsory.[89]

The Law Commission expressed only a preliminary opinion on the relationship between land obligations and expropriation. It was of the view that an authority that acquires land benefiting by a land obligation should acquire the benefit, and an authority that acquires servient land should be subject to the burden, except to the extent that its statutory powers, when exercised, would be inconsistent with the obligation. In the latter case the obligation would be suspended, but the dominant owner could claim compensation for injurious affection. In the case of development obligations the "dominant owner" for this purpose would be those unit owners who would be entitled to enforce the obligation, either by themselves or through the manager. Moreover, the Lands Tribunal would have jurisdiction to vary or extinguish the scheme if the expropriation should have a detrimental effect upon it.[90]

The Commission did not make a final recommendation regarding the question whether the Crown should be bound by the proposed legislation, although its tentative conclusion was that it ought to be bound.[91]

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[85] *Ibid.*, paras. 19.5-19.6, at 128.

[86] *Ibid.*, paras. 19.7-19.11, at 129.

[87] *Ibid.*, paras. 20.1-20.32, at 130-36.

[88] *Ibid.*, paras. 23.1-23.9, at 144-46.

[89] *Ibid.*, paras. 22.1-22.9, at 140-41.

[90] *Ibid.*, paras. 21.3-21.10, at 137-39.

[91] *Ibid.*, para. 25.7, at 158.

(n) Consequential Changes to Existing Law

The English Report recommended that the existing rules of law and equity respecting the benefit and the burden of covenants that touch and concern land should cease to apply to covenants made after the commencement of the legislation, subject to the following exceptions:[92] (1) covenants made between landlord and tenant with respect to the demised land; (2) covenants entered into under statutory powers; and (3) the doctrine of *Halsall v. Brizell*.[93] Moreover, restrictive covenants entered into after the commencement of the proposed regime, but made pursuant to an existing obligation under a scheme (such as a building or letting scheme) established before that date, would not be governed by the proposed legislation.[94]

3. NEW ZEALAND: PROPOSALS FOR REFORM

(a) Introduction

The 1985 Report of the New Zealand Property Law and Equity Reform Committee, concerning positive covenants affecting land,[95] originated with a relatively narrow focus. The Committee was asked, in 1978, to study the rights and obligations arising in connection with rights of way. The specific concern was that, in the absence of a contractual obligation to do so, the owner of a right of way could take the benefit thereof, without contributing to the cost of maintenance. The Committee concluded that, since positive covenants were not enforceable against subsequent owners, the problem could not be solved simply by including repair covenants in the instrument establishing a right of way. As a result of this deficiency in the law, the Committee's terms of reference were expanded to include a study of the law of positive covenants generally. Subsequently, an inquiry into the right to physical support of land was also incorporated into the Committee's study.

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[92] *Ibid.*, paras. 24.8-24.33, at 148-54.

[93] [1957] Ch. 169, [1957] 1 All E.R. 371. As we noted earlier, *supra*, ch. 2, sec. 4(c)(ii), this doctrine requires a person claiming the benefit of a deed to take it subject to the burdens.

[94] English Report, *supra*, note 1, paras. 24.35-24.38, at 154-55.

[95] New Zealand Report, *supra*, note 2. The Committee's terms of reference, and the origins of its study, are set out in the New Zealand Report, paras. 1-6, at 1-5.

It should be noted that the New Zealand Report also included recommendations concerning implied obligations. The Committee recommended that where neighbours have entered into a right of way agreement in respect of a driveway, but have failed or neglected to provide adequately for its use and maintenance, unless the parties have agreed to the contrary, certain obligations should be implied. These recommendations, moreover, were a first measure only. Once expertise had developed, it was acknowledged that the case might be made for extending the implied obligations to other rights of way and to other types of arrangement among neighbours. See New Zealand Report, paras. 17-21, at 12-15.

Much of the reasoning for the Committee's recommendations is to be found in a Working Paper,[96] circulated for discussion in 1981, and in the Committee's response to the comments received on the Working Paper.[97] In addition, much of the detail of the Committee's recommendations is to be found in the draft legislation proposed by the Committee.[98]

The approach to reform adopted by the New Zealand Committee was precisely the approach that was rejected by the English Law Commission.[99] The New Zealand Committee did not consider it necessary to create an entirely new type of land obligation; rather, it proposed that, to the extent possible, positive covenants should be assimilated to the present law of restrictive covenants. The Committee was content that the courts should resolve any technical deficiencies.[100]

(b) Express Positive Covenants

The New Zealand Committee's central recommendation was that positive covenants should be enforceable against subsequent owners of the servient land who take with notice of the obligation.[101] To provide subsequent purchasers with such notice, the Committee recommended that the land registration statute be amended to permit positive covenants to be registered on the title to the servient land.[102]

Since it might be unfair to impose a potentially burdensome obligation on someone with only a limited interest in the servient land,[103] the Draft Act proposed by the Committee would restrict liability to owners of the fee

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[96] New Zealand, Property Law and Equity Reform Committee, *Working Paper*[:] *Positive Covenants in Respect of Land* (1981) (hereinafter referred to as "Working Paper"), in New Zealand Report, *supra*, note 2, Appendix I, at 29-61.

[97] New Zealand, Property Law and Equity Reform Committee, *Responses to Comments on Working Paper* (hereinafter referred to as "Committee Response"), in New Zealand Report, *supra*, note 2, Appendix II, at 62-71.

[98] The draft *Property Law Amendment Act 1985*, proposed by the Committee, is attached as Appendix III to the New Zealand Report, *supra*, note 2, at 72-85 (hereinafter referred to as "Draft Act").

[99] See *supra*, this ch., sec. 2(a).

[100] New Zealand Report, *supra*, note 2, para. 30, at 22-23.

[101] *Ibid.*, paras. 14 and 28(a), at 10 and 19. See, also, Working Paper, *supra*, note 96, at 38-39 and s. 64A of the *Property Law Act 1952*, as proposed in s. 2 of the Draft Act, *supra*, note 98.

[102] New Zealand Report, *supra*, note 2, paras. 14 and 28(c), at 11 and 20. See, also, Working Paper, *supra*, note 96, at 39 and s. 126A of the *Property Law Act 1952*, as proposed in s. 3 of the Draft Act, *supra*, note 98.

[103] See Working Paper, *supra*, note 96, at 40-41.

simple, and "occupiers",[104] which term includes mortgagees who have taken possession and lessees for a term of at least ten years.[105] Thus, while a person with some lesser interest in the servient land would continue to be bound by restrictive covenants in accordance with established principles, such a person would not be bound by a positive covenant.[106]

An owner or occupier would cease to be bound by a positive covenant after she has ceased to own or occupy the servient land, although liability would continue thereafter for breaches that occurred during the period of ownership or occupation.[107]

The New Zealand Committee rejected the notion that positive covenants should exist in gross. Thus, not only must the covenant touch and concern the land, but the covenant must also have been intended for the benefit of the dominant land, rather than for the benefit of the covenantee personally.[108]

It was recommended that the statutory power to modify or extinguish restrictive covenants should be made applicable to positive covenants, and that, to accommodate such obligations, the power should be extended.[109] An occupier of the servient land would be entitled to apply to the court for an order modifying or wholly or partially extinguishing a positive or negative covenant upon the following grounds:[110]

(1) a change in the nature or extent of the user of the dominant land or the servient land;

(2) a change in the character of the neighbourhood;

(3) a change in any other circumstance that the court considers relevant;

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[104] Section 64A(2)(a) of the *Property Law Act 1952*, as proposed in s. 2 of the Draft Act, *supra*, note 98. See, also, New Zealand Report, *supra*, note 2, para. 28(a), at 19-20.

[105] Section 126 of the *Property Law Act 1952*, as proposed in s. 3 of the Draft Act, *supra*, note 98. See, also, New Zealand Report, *supra*, note 2, para. 28(a), at 19-20.

[106] *Ibid.*, para. 28(a), at 20.

[107] Section 64A(2)(b) of the *Property Law Act 1952*, as proposed in s. 2 of the Draft Act, *supra*, note 98. See, also, New Zealand Report, *supra*, note 2, para. 28(a), at 20.

[108] Section 64A(1)(a) of the *Property Law Act 1952*, as proposed in s. 2 of the Draft Act, *supra*, note 98. See, also, New Zealand Report, *supra*, note 2, para. 28(a), at 20; Working Paper, *supra*, note 96, at 41-42; and Committee Response, *supra*, note 97, at 63-65.

[109] New Zealand Report, *supra*, note 2, para. 16, at 11. See, also, Working Paper, *supra*, note 96, at 42-46 and s. 126G of the *Property Law Act 1952*, as proposed in s. 3 of the Draft Act, *supra*, note 98.

[110] *Ibid.*

(4) the change is necessary to prevent the covenant from impeding the reasonable user of the servient land in a manner unforeseen by the original parties;

(5) those concerned have expressly or impliedly agreed to the change; and

(6) the change would not cause substantial injury to anyone entitled to the benefit of the covenant.

The Committee concluded that, because it is more accessible and less formal than the High Court, jurisdiction in all matters arising out of its recommendations should be conferred upon the District Court.[111]

Finally, the regime proposed by the New Zealand Committee would not apply to leasehold covenants,[112] or to covenants entered into prior to the commencement of the proposed amendments.[113]

4. TRINIDAD AND TOBAGO: REFORM LEGISLATION

(a) Introduction

It would appear that Trinidad and Tobago is the only common law jurisdiction in which legislation has been enacted that would permit positive covenants to run with land. As part of a comprehensive revision of the law of real property in 1981,[114] based in large part upon the English *Law of Property Act 1925*,[115] the legislature of Trinidad and Tobago enacted legisla-

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[111] New Zealand Report, *supra*, note 2, para. 29, at 21-22. See, also, Working Paper, *supra*, note 96, at 57.

[112] Section 64A(1)(b) of the *Property Law Act 1952*, as proposed in s. 2 of the Draft Act, *supra*, note 98. See, also, New Zealand Report, *supra*, note 2, para. 28(b), at 20.

[113] Section 64A(6) of the *Property Law Act 1952*, as proposed in s. 2 of the Draft Act, *supra*, note 98. See, also, New Zealand Report, *supra*, note 2, para. 15, at 11.

[114] The several statutes include the *Landlord and Tenant Act, 1981*, Stats. Trin. & Tob. 1981, No. 19; the *Land Law and Conveyancing Act, 1981*, Stats. Trin. & Tob. 1981, No. 20; the *Trustee Act, 1981*, Stats. Trin. & Tob. 1981, No. 21; the *Limitation Act, 1981*, Stats. Trin. & Tob. 1981, No. 22; the *Condominiums Act, 1981*, Stats. Trin. & Tob. 1981, No. 23; the *Land Registration Act, 1981*, Stats. Trin. & Tob. 1981, No. 24; the *Unit Trust Corporation of Trinidad and Tobago Act, 1981*, Stats. Trin. & Tob. 1981, No. 26; the *Succession Act, 1981*, Stats. Trin. & Tob. 1981, No. 27; and others. These statutes were scheduled to come into force in 1983: Bell, "Enforcement of Positive Covenants in Trinidad and Tobago", [1983] Conv. 211, at 218, *n*. 21.

[115] *Supra*, note 75. The comprehensive reform deals also with easements and profits and, in that respect, was based on the English Law Commission's Working Paper, *supra*, note 10.

tion respecting the enforcement of both positive and restrictive covenants running with land,[116] and the discharge and modification of such covenants.[117] This legislation does not extend to condominiums, however, since specific condominium legislation has been enacted in that respect.[118]

(b) Freehold Covenants

(i) Generally

The influence of the English legislation is evident in the context of freehold covenants.[119] The provisions respecting the benefit and the burden of covenants relating to land[120] are virtually identical to the English equivalents.[121] Moreover, the provisions respecting covenants with two or more persons jointly and by a person with himself and others[122] are very similar to the English enactments.[123] The Trinidad and Tobago legislation adds a further provision to the effect that a covenant made by two or more persons will be jointly and severally binding upon the covenantors, and a covenant made with two or more persons will be deemed to have been made with each of the covenantees. In either case these rules will apply, whether the covenant is express or implied by statute, unless a contrary intention is expressed.[124]

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[116] *Land Law and Conveyancing Act, 1981*, *supra*, note 114, s. 118.

[117] *Ibid.*, s. 166.

[118] *Condominiums Act, 1981*, *supra*, note 114.

[119] The Trinidad and Tobago legislation contains a novel provision. Upon application of an owner who intends to improve or develop his land, an order can be made imposing an obligation or restriction upon neighbouring land, for the benefit of the dominant land. Once the order is registered, it has the same effect as a covenant created expressly by the parties. See *Land Law and Conveyancing Act, 1981*, *supra*, note 114, s. 167.

[120] *Ibid.*, ss. 112-13.

[121] *Law of Property Act 1925*, *supra*, note 75, s. 78 (discussed *supra*, ch. 2, sec. 5(c)(iii)a), and s. 79 (discussed *supra*, ch. 2, note 163). It should be noted that the Trinidad and Tobago provisions do not repeat the second paragraph of s. 78(1) or s. 79(2), which extend the meaning of "successors in title" to include "the owners and occupiers for the time being" of the land. However, this extended definition is provided for elsewhere. See *Land Law and Conveyancing Act, 1981*, *supra*, note 114, s. 118(1).

[122] *Ibid.*, ss. 115-16.

[123] *Law of Property Act 1925*, *supra*, note 75, ss. 81-82.

[124] *Land Law and Conveyancing Act, 1981*, *supra*, note 114, s. 117.

(ii) Enforceability of Freehold Covenants

The innovation in the 1981 legislation is section 118.[125] In essence, this section provides for the enforcement of any covenant or agreement in respect of servient land, for the benefit of dominant land, that: (1) restricts the use or the execution of works on the servient land; (2) requires the execution of works on the servient land; (3) requires the payment of or contribution to the cost of works on the dominant land; or (4) imposes any other negative or positive obligation concerning either the servient or the dominant land. The section further provides that the covenant is enforceable by action by the owner or occupier of the dominant land, or any part thereof, against the owner or occupier of the servient land, or any part thereof, or against any person interfering with the performance or observance of the obligations.[126] The term "works" is broadly defined to include constructional works as well as such activities as planting trees and hedges, digging ditches, making drains and maintaining, repairing, cleaning and replacing any works.[127]

The section applies only to covenants or agreements affecting freehold land entered into after the commencement of the Act that are contained in a deed registered under the registry system, or entered on a certificate of title under the land titles system, under the *Land Registration Act, 1981*,[128] and it applies only to the extent that a contrary intention is not expressed in the covenant or agreement.[129]

The section further provides, in effect, that a covenant or agreement is enforceable only by or against those who have an interest in or who occupy

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[125] Section 118(1) of the *Land Law and Conveyancing Act, 1981*, *ibid.*, provides as follows:

> 118.—(1) Any covenant or agreement which imposes in respect of land (hereinafter referred to as 'the servient land') for the benefit of other land (hereinafter referred to as 'the dominant land') an obligation—
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> (a) restricting the use of, or the execution of works on, the servient land; or
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> (b) to execute any works on the servient land; or
>
> (c) to pay, or contribute to, the cost of works to be carried out on the dominant land; or
>
> (d) of any other negative or positive nature concerning the dominant and servient land;
>
> is enforceable by action by the owner or occupier for the time being of the dominant land, or any part thereof, against the owner or occupier for the time being of the servient land, or any part thereof, or any person interfering with the performance or observance of the obligations.

[126] *Ibid.*

[127] *Ibid.*, s. 118(3).

[128] *Supra*, note 114.

[129] *Land Law and Conveyancing Act, 1981*, *supra*, note 114, s. 118(4).

the dominant or servient land,[130] unless the parties provide otherwise.[131] Hence, once the original covenantor or any successor in title assigns the servient land, she will no longer be liable on the covenant. Similarly, once the original convenantee or any successor in title assigns the dominant land, she will no longer be entitled to enforce the covenant.

Finally, upon the application of any interested person, or upon a reference by the Land Registrar, the court is empowered to determine whether a covenant is enforceable under the section and to make consequential orders.[132]

Section 118, therefore, makes any covenant, whether positive or negative, run with the land, provided it is not personal to the parties, it is registered, and a contrary intention is not expressed. To the extent that the burden of positive covenants is made to run with the land, this is a reversal of the common law. While the section could have been drafted in somewhat clearer terms, the reference to covenants "in respect of land" and to the benefit of the dominant land[133] would seem to indicate that the section was not intended to make personal covenants run with land.

(iii) Discharge or Modification of Covenants

Under section 166 of the *Land Law and Conveyancing Act, 1981*,[134] the Land Commission[135] is empowered to make an order modifying or discharging, in whole or in part, an obligation or restriction imposed by covenant or agreement.[136] The power does not extend to obligations or

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[130] *Ibid.*, s. 118(2), which provides as follows:

> 118.—(2) No covenant or agreement is enforceable under sub-section (1) by or against any person whose interest in, or occupation of the dominant or servient land has ceased.

[131] *Ibid.*, s. 118(4)(c).

[132] *Ibid.*, s. 118(5).

[133] See Bell, *supra*, note 114, at 212-13.

[134] Section 166 is based upon a similar provision in the *Law of Property Act 1925*, *supra*, note 75, s. 84, but is expanded somewhat because of the extension to positive covenants.

[135] The Land Commission is a tribunal created under Part III of the *Land Registration Act, 1981*, *supra*, note 114, and has jurisdiction over a wide variety of matters arising in land transactions.

[136] *Land Law and Conveyancing Act, 1981*, *supra*, note 114, s. 166(1) and (2). Easements and profits may be similarly modified or discharged. Section 166(1) and (2) provides as follows:

> 166.—(1) Subject to subsection (12), in this section—
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> (a) 'obligation or restriction' means any obligation or restriction on land arising by virtue of the existence of an easement or profit *a prendre* or imposed by covenant or agreement;

restrictions created or imposed by statute.[137] Whether the Land Commission or the court would have power to discharge or modify such imposed covenants is unclear.

A covenant may be discharged or modified in the following circumstances: (1) if it has become obsolete by reason of any change in the character of the neighbourhood or other circumstances; (2) if it affords no practical benefit to the dominant owner; (3) if it restricts unreasonably the owner's use or enjoyment of her land or it impedes unreasonably the development of such land and does not give the dominant owner any practical benefit of substantial value or advantage, or is contrary to public policy and the dominant owner can be adequately compensated; (4) if the dominant owner has agreed expressly or impliedly by her acts or omissions to the modification or discharge; or (5) if an obligation, as distinct from a restriction, has become unduly onerous compared to the benefit it confers.[138]

An order modifying or discharging a covenant may direct payment to the dominant owner of compensation for the loss or disadvantage suffered by reason of the order, or compensation for any effect that the covenant had

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(b) 'dominant owner' means any person entitled to enforce any such obligation or restriction.

(2) On the application of any person interested in land subject to an obligation or restriction, the Land Commission may, by order, modify or wholly or partially discharge the obligation or restriction on being satisfied that—

(a) by reason of any change in the character of the neighbourhood or other circumstances of the case whatsoever, the obligation or restriction has become obsolete; or

(b) the obligation or restriction secures no practical benefit to the dominant owner; or

(c) the obligation or restriction—

(i) unreasonably restricts the owner's use or enjoyment of his land or unreasonably impedes the development of his land; and

(ii) does not secure to the dominant owner any practical benefit of substantial value or advantage to him, or is contrary to the public interest;

and the dominant owner can be adequately compensated for any loss or disadvantage he would suffer from the discharge or modification; or

(d) the dominant owner has agreed either expressly or by implication, by his acts or omissions, to the obligation or restriction being discharged or modified; or

(e) in the case of an obligation, it has become unduly onerous in comparison with the benefit which it confers.

[137] *Ibid.*, s. 166(12)(b). Hence, it does not extend to covenants imposed under s. 167, discussed *supra*, note 119.

[138] *Land Law and Conveyancing Act, 1981, supra*, note 114, s. 166(2), reproduced *supra*, note 136.

when it was created or imposed in reducing the consideration then received for the land affected by it.[139]

The Commission must take into account planning considerations[140] and may also add further reasonable obligations or restrictions if they are accepted by the applicant.[141] The Land Commission has wide powers to direct inquiries and to give notice of any application and to act on such evidence as it thinks appropriate.[142] The Commission also has power on an application for modification or discharge to determine whether land is subject to an obligation or restriction and the nature and extent thereof.[143]

An order under section 166 must be registered,[144] whereupon it binds all persons then or thereafter entitled to enforce the obligation or restriction, whether or not they were parties to the proceedings or received notice of them.[145]

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[139] *Land Law and Conveyancing Act, 1981*, *supra*, note 114, s. 166(3), which provides as follows:

> 166.—(3) Where an order is made under subsection (2) the applicant may be directed to pay to the dominant owner either—
>
> (a) a sum to make up for any loss or disadvantage suffered by him in consequence of the discharge or modification; or
>
> (b) a sum to make up for any effect which the obligation or restriction had at the time when it was created or imposed, in reducing the consideration then received for the land affected by it.

[140] *Ibid.*, s. 166(4), which provides as follows:

> 166.—(4) In determining whether an obligation or restriction ought to be discharged or modified, the Land Commission shall take into account the development plan (if any) and any declared or ascertainable pattern for the grant or refusal of planning permission in the relevant areas, as well as the period at which and the context in which the obligation or restriction was created or imposed and any other material circumstances.

[141] *Ibid.*, s. 166(5), which provides as follows:

> 166.—(5) In exercising its power to modify an obligation or restriction under this section, the Land Commission has the power to add such further obligation or restriction as appears to it to be reasonable in view of the relaxation of the existing obligation or restriction, and as may be accepted by the applicant, so that the Land Commission may accordingly refuse to modify an obligation or restriction without some such addition.

[142] *Ibid.*, s. 166(6) and (8).

[143] *Ibid.*, s. 166(9).

[144] *Ibid.*, s. 166(10).

[145] *Ibid.*, s. 166(7), which provides as follows:

> 166.—(7) An order made under this section is, upon registration under subsection (10), binding on all persons, whether of full age or capacity or not, then entitled or thereafter to become entitled to enforce the obligation or restriction to which the order relates, and whether or not those persons are parties to the proceedings or have been served with notice of them.

5. THE UNITED STATES

(a) PRESENT LAW

(i) Introduction

Although the American law of covenants and the Anglo-Canadian law of covenants share a common ancestry, they have evolved along divergent lines. The American law of covenants distinguishes between "real covenants" (covenants that run with freehold land at law), and "equitable servitudes" (covenants that run with land in equity).[146] Unlike the Anglo-Canadian position with respect to covenants affecting freehold land at law,[147] the American law of real covenants derives from *Spencer's Case*.[148] Accordingly, American law permits both the benefit and the burden of real covenants to run with freehold land. Equitable servitudes, on the other hand, like the Anglo-Canadian doctrine of restrictive covenants, find their origin in *Tulk v. Moxhay*.[149] There is considerable overlap and confusion between real covenants and equitable servitudes[150] and, indeed, it has been suggested that, apart from technicalities, there is no reason today not to merge them.[151]

(ii) Real Covenants

a. Generally

It is fundamental to the law of real covenants, deriving from the doctrine in *Spencer's Case*, that real covenants run with estates in the land

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[146] Of particular use as background material for this section were the following: *American Law of Property* (1952), Vol. 2, Part 9, chs. 1 and 2; Powell (Rohan, ed.), *The Law of Real Property* (1988), Vol. 5, ch. 60; Thompson, *Commentaries on The Modern Law of Real Property* (1962), Vol. 7, ch. 48; American Law Institute, *Restatement of the Law of Property* (1944), Vol. V (hereinafter referred to as "Restatement"), Part III; Reichman, "Toward a Unified Concept of Servitudes" (1982), 55 So. Cal. L. Rev. 1177; French, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands" (1982), 55 So. Cal. L. Rev. 1261; Berger, "A Policy Analysis of Promises Respecting the Use of Land" (1970), 55 Minn. L. Rev. 167; and Stoebuck, "Running Covenants: An Analytical Primer" (1977), 52 Wash. L. Rev. 861.

[147] The Ontario position with respect to covenants affecting freehold land at law is discussed *supra*, ch. 2, sec. 4.

[148] (1583), 5 Co. Rep. 16a, 77 E.R. 72 (K.B.). In addition, both the American and the Anglo-Canadian law of leasehold covenants derive from this decision.

[149] (1848), 2 Ph. 774, 41 E.R. 1143 (Ch.).

[150] See Rau, "Covenants Running with the Land: Viable Doctrine or Common Law Relic?" (1978), 7 Hofstra L. Rev. 139, at 152-53 and 178-80.

[151] See Newman and Losey, "Covenants Running with the Land, and Equitable Servitudes; Two Concepts or One?" (1970), 21 Hastings L.J. 1319.

and not with the land itself.[152] For real covenants to run at law, it would appear that the following conditions must be satisfied: (1) the original parties must intend to bind their successors; (2) there must be privity of estate; and (3) the covenant must touch and concern some estate in land. We discuss each of these elements briefly below.

b. Intention of the Parties

In *Spencer's Case* it was held that, even though a covenant touched or concerned the land, if it concerned a thing *in posse*, as distinct from a thing *in esse*, the covenant would not bind the assigns unless they were mentioned expressly. This requirement has been disregarded or overruled in most of the American states. Rather, the courts focus upon the intention of the original parties, that is, whether the parties intended the covenant to be enforceable by or against their successors. The presence or absence of the word "assigns" is thus merely evidence of such an intention. Accordingly, the question whether or not a covenant runs with the land will be determined by the nature of the covenant, the circumstances of the transaction and the language of the instrument.[153]

c. Privity of Estate

In order for the burden or the benefit of a real covenant to run with the land at law, there must be privity of estate. In Anglo-Canadian law such privity exists only between landlord and tenant and their respective assignees.[154] The American notion of privity of estate, however, is quite different. Indeed, it would appear that American law recognizes four distinct types of privity of estate.

The first type of privity of estate, "tenurial privity", is essentially what is understood by the notion of privity of estate in Anglo-Canadian law. Hence, tenurial privity exists only between a lessor and lessee and their respective assignees.

The second type of privity of estate recognized in American law is "simultaneous interest privity". This type has been adopted in Massachusetts and, perhaps, a few other states.[155] In order for a covenant to run with a freehold interest in land under this type of privity, the parties must have a continuing and simultaneous interest in the land. Such an interest may

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[152] Clark, *Real Covenants and Other Interests Which "Run With Land"* (2d ed., 1947), at 93-94.

[153] Powell, *supra*, note 146, ¶ 673[2][b], at 60-49 to 60-53; *American Law of Property*, *supra*, note 146, § 9.10, at 365-66; Berger, *supra*, note 146, at 173-79; and Restatement, *supra*, note 146, § 531, Comment c, at 3197-98.

[154] See *supra*, ch. 2, sec. 2.

[155] *American Law of Property*, *supra*, note 146, § 9.11, at 368-69. See, also, Powell, *supra*, note 146, ¶ 673[2][c], at 60-60 to 60-61.

arise, for example, if the vendor conveys land to the purchaser together with an easement over land retained by the vendor. If, in the same deed, the purchaser then covenants to keep the easement in repair, the burden of the covenant will run.

The third type of privity of estate, "horizontal privity", or, as it is also known, "instantaneous horizontal privity",[156] will enable the benefit and the burden of a covenant to run with land when a vendor conveys property to a purchaser and a covenant is given in connection with the transaction.[157] The essential feature of horizontal privity is that a conveyance is required between the original parties. It would appear that the majority of American states have adopted this approach,[158] and it is supported by the Restatement.[159] However, horizontal privity appears generally to be required only for the running of the burden of a covenant, not for the running of the benefit.[160]

The fourth and final type of privity of estate is "vertical privity". In contrast to all of the other types of privity of estate, discussed above, vertical privity does not refer to a relationship between the original parties. Rather, it refers to the fact that the current owner of the benefited or the burdened land, by or against whom it is sought to enforce the covenant, is a successor to the estate of the original covenantor or the original covenantee, as the case may be. The Restatement would appear to require both horizontal (or tenurial, or simultaneous interest) privity and vertical privity for the running of the burden,[161] while it would require vertical privity only for the running of the benefit.[162]

It will be seen that privity, in particular vertical privity, is an entirely different notion than that comprehended by Anglo-Canadian law. While the various American doctrines of privity have succeeded in permitting the burden of covenants to run with freehold land at law in the United States, it must be recognized that they are fictions. Roscoe Pound put the matter this way:[163]

> In the United States, when first we sought to extend the law as to the creation of legal servitudes by permitting such covenants to run, we did not break over the rule expressly, but our courts instead turned to the word 'privity', which in its proper use refers to a relation, and thought the result justified by the conjuring up of a fictitous privity.

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156 Berger, *supra*, note 146, at 181, and Browder, "Running Covenants and Public Policy" (1978), 77 Mich. L. Rev. 12, at 21.

157 See, for example, *Albright v. Fish*, 136 Vt. 387, 394 A. 2d 1117 (1978).

158 See Powell, *supra*, note 146, ¶ 673[2][c], at 60-62.

159 *Supra*, note 146, §534, at 3205-06.

160 *Ibid.*, § 548, at 3271.

161 *Ibid.*, §§ 534-35, at 3205-06 and 3210.

162 *Ibid.*, §§ 547-48, at 3266 and 3271.

163 Pound, *The Spirit of the Common Law* (1921), at 23.

d. Touching and Concerning

According to *Spencer's Case*,[164] a covenant cannot run with an estate in land unless it touches or concerns the estate; a covenant that is personal or collateral cannot run. In the context of freehold estates, there will normally be two different parcels of land involved: that conveyed and that retained. The estates will be in separate parcels, the benefit running with one and the burden running with the other.[165] It would appear that the touch and concern requirement is applied separately to each parcel.[166]

The question then arises whether a covenant that does not touch and concern the retained land, such that it is personal to the grantor, is able to run with land at all. The position taken in the Restatement in this respect is based upon a perceived social policy that opposes the running of the burden of a covenant between owners in fee simple, unless the covenant also touches and concerns the benefited land. This policy also explains why the Restatement insists upon privity of estate between the covenantor and covenantee with respect to the running of the burden, but not with respect to the running of the benefit.[167] The Restatement indicates, therefore, that if the benefit of a covenant concerning the physical use of land is in gross, the burden cannot run; however, if the burden of such a covenant is in gross, the benefit may run.[168] It further states that if the covenant is one not to compete, the burden cannot run because it does not enhance the land physically, but does so only commercially;[169] however, the benefit of such a covenant may run.[170] Finally, it states that the burden cannot run, even if it touches and concerns the land, if it is clearly greater than the benefit, but there is no similar restriction upon the running of the benefit.[171]

The following test for the content of the touch and concern requirement measures the economic impact of the benefit and the burden of covenants:[172]

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[164] *Supra*, note 148.

[165] See, for example, *Thruston v. Minke*, 32 Md. 487 (1870), in which a hotel owner granted a lease of adjacent land that he also owned to the defendant. The lessee covenanted not to construct a building exceeding three stories on it. The landlord then sold the reversion. It was held that the benefit of the covenant ran with the estate in the hotel property.

[166] See *supra*, text accompanying notes 158-60.

[167] Restatement, *supra*, note 146, §537(a), at 3218.

[168] *Ibid.*, § 543, Comment c, at 3255-56.

[169] *Ibid.*, § 537, Comment f, at 3220-21.

[170] *Ibid.*, § 543(2)(b), Comment e, at 3258-59.

[171] *Ibid.*, § 537, Comment h, at 3222-24.

[172] Clark, *supra*, note 152, at 97, adopting and restating an earlier formulation by Professor Bigelow to the same effect, in Bigelow, "The Content of Covenants in Leases" (1914), 12 Mich. L. Rev. 639.

> If the promisor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee's legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches or concerns that land.

This test, which measures the impact of the burden and the benefit separately, is now widely accepted.[173]

e. Continuing Rights and Liabilities of Parties

Where a covenantor assumes the burden of a covenant, for example, upon a conveyance of property to him, he stands in both privity of contract and privity of estate (according to the American doctrine) with the covenantee. When the covenantor later assigns the burdened land, he is no longer in privity of estate with the covenantee, although they remain in privity of contract. Nevertheless, the majority of American cases hold that the covenantor's *contractual* liability ends upon assignment of the servient land, since it is highly unlikely he intended that it should continue. Moreover, since the covenantor has parted with the land, it is no longer within his control. There is, thus, an implied release upon assignment.[174] However, the implication does depend upon the intention of the parties, as manifested in the making of the covenant.[175]

Similarly, when the covenantee assigns the dominant land, the assignee is thereafter the only person entitled to enforce the covenant, there being an implied assignment of the privity of contract right with the benefited land. Of course, the assignee could, in any event, sue on the basis of privity of estate.[176]

(iii) Equitable Servitudes

a. Generally

As we noted earlier, the American doctrine of equitable servitudes, or equitable restrictions, derives from *Tulk v. Moxhay*.[177] While the Anglo-Canadian doctrine, as enunciated by that and subsequent cases, is confined to negative or restrictive covenants,[178] the American doctrine of equitable

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[173] See Powell, *supra*, note 146, ¶ 673[2][a], at 60-40 to 60-47, and authorities cited therein.

[174] *American Law of Property*, *supra*, note 146, § 9.18, at 389.

[175] Restatement, *supra*, note 146, § 538, at 3224.

[176] *American Law of Property*, *supra*, note 146, §9.19, at 390.

[177] *Supra*, note 149.

[178] See *supra*, ch. 2, sec. 5(b)(i).

servitudes extends to all covenants, including affirmative covenants.[179] In order for a covenant to be enforceable in equity the following conditions must be satisfied: (1) the original parties must have intended the covenant to run, except perhaps in the case of the burden; (2) the covenant must "touch and concern" the land; and (3) the successor to the burden must have notice of the covenant.[180]

From the fact that equitable servitudes are interests in land, it follows that they run with the land, and not with estates in the land, as do real covenants.[181] Moreover, as a result, all the erudite and arid learning regarding privity of estate, which bedevils the law of real covenants, becomes irrelevant.[182] It should also follow that an adverse possessor will be bound by the servitude.[183]

As a practical matter, it would appear that, except in the context of leasehold covenants, actions to enforce equitable servitudes have largely replaced those to enforce real covenants. Often covenants will satisfy the requirements for running with the land both at law and in equity, and, in most cases, equitable relief is sought, rather than a judgment in damages.[184]

b. Intention of the Parties

Equitable servitudes are not concerned with the requirement in *Spencer's Case*[185] that the word "assigns" be used in order to evince an intention that the burden shall run.[186] Indeed, it has been suggested that there is no specific requirement that the parties must intend the burden of the covenant to run with the land. However, since there is no equitable servitude unless it touches and concerns the burdened land, and since this requirement ordinarily indicates an intention that the covenant should run, this is not particularly significant.[187]

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[179] *American Law of Property*, *supra*, note 146, §§ 9.24 and 9.36, at 401 and 437-39.

[180] Powell, *supra*, note 146, ¶ 673[1], at 60-38.

[181] Stoebuck, *supra*, note 146, at 889.

[182] *American Law of Property*, *supra*, note 146, §§ 9.26, 9.27, and 9.31, at 409-12 and 427-28.

[183] *Ibid.*, § 9.27, at 411. See, also, Restatement, *supra*, note 146, § 539, Comment i, Illustration 3, at 3234.

[184] Newman and Losey, *supra*, note 151, at 1338-39, and Stoebuck, *supra*, note 146, at 905-07.

[185] *Supra*, note 148.

[186] See *supra*, this ch., sec. 5(a)(ii)b.

[187] Stoebuck, *supra*, note 146, at 895. But compare Restatement, *supra*, note 146, § 539, Comment h, at 3231-32.

By contrast, there must be evidence that the parties intended that the benefit should run with the benefited land.[188] Thus, the covenant cannot be for the personal benefit of the covenantee; that is, the benefit cannot be in gross.[189] Rather, it must benefit some land owned by the covenantee. However, since American law recognizes that easements in gross can be enforced against assignees of the servient land (although it does not always permit them to be assigned) and because an equitable servitude is analogous to an easement, some courts have also allowed the enforcement of equitable servitudes in gross.[190] This view is supported by the *American Law of Property*, which suggests that equity should grant enforcement of such covenants by injunction, if the promisee can show material damage.[191]

c. Touching and Concerning

The requirement that the covenant touch and concern the land is much the same for equitable servitudes as it is for real covenants.[192]

d. Notice

The notice requirement follows from the fact that equitable servitudes are creatures of equity, and, therefore, cease to be effective as against a *bona fide* purchaser for value without notice of the interest. To a large extent, the notice requirement has been rendered superfluous in North America, due to the prevalence of recording statutes, which give notice to anyone subsequently dealing with the land of all prior registered interests.

(b) Private Proposals for Reform

In this section we shall make brief reference to certain private calls for reform of the American law of servitudes in general, and of covenants in particular. While there do not appear to be official or quasi-official movements for reform of the American law, many voices have been raised in recent years calling for reform. In many respects, the Restatement[193] has proved to be deficient and has been subjected to much criticism. This criticism is due, in part, to the Restatement's insistence that, for policy reasons, it should be made relatively difficult for the burden of covenants to

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[188] *American Law of Property*, *supra*, note 146, § 9.29, at 415.

[189] Stoebuck, *supra*, note 146, at 895-96.

[190] See, for example, *Huber v. Guglielmi*, 29 Ohio App. 290, 163 N.E. 571 (1928).

[191] *American Law of Property*, *supra*, note 146, § 9.32, at 429-30.

[192] See the discussion of the touch and concern requirement, in the context of real covenants, *supra*, this ch., sec. 5(a)(ii)d.

[193] *Supra*, note 146.

run with land. It is also due, in part, to the Restatement's perpetuation of the confused doctrine of privity in respect of real covenants.[194]

In view of the fact that equitable servitudes have largely replaced real covenants in practice,[195] and in view of the fact that the differences between equitable servitudes and real covenants have been largely reconciled, it has been suggested that the distinction should be abandoned and that the two concepts should be replaced by a single servitude.[196] The elements of such a servitude, it has been argued, would be as follows:[197]

> (1) a covenant enforceable to create an interest in land between the parties who made it, (2) the burden of which touches and concerns the covenantor's land (and the benefit of which may touch and concern the covenantee's land), (3) compliance with the applicable recording act as to the burdened land, and (4) a succession of interest in or possession of the burdened land (or in or of the benefited land if the benefit is to run).

Another commentator has argued that, while complexity in law is sometimes necessary, it is not necessary in the context of covenants. In order to avoid perpetuating the present complexity, the author suggests that the cases on covenants should be decided by reference to the underlying policies, rather than by reference to outmoded precedents and concepts.[198]

In two significant articles presented as part of a symposium on a unified law of servitudes, the argument is made that not only ought real covenants and equitable servitudes to be assimilated, but easements should also be integrated into a unified law of servitudes. Thus, in the first article, it is suggested that the several doctrines, at one time discrete, have now become nearly indistinguishable from each other, such that they have merged in fact. Hence, there can be no theoretical or practical objection to their merger in law.[199]

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[194] See *supra*, this ch., sec. 5(a)(ii)c.

[195] Cross, "Interplay between Property Law Change and Constitutional Barriers to Property Law Reform" (1960), 35 N.Y.U. L. Rev. 1317, at 1327, and Stoebuck, *supra*, note 146, at 920.

[196] Newman and Losey, *supra*, note 151, at 1344-45. See, also, Rau, *supra*, note 150, at 183.

[197] Stoebuck, *supra*, note 146, at 921.

[198] Berger, *supra*, note 146, at 189-90 and 234.

[199] Reichman, *supra*, note 146. In the second article it is also demonstrated that all three servitudes can be merged into a simple, modern servitude: French, *supra*, note 146.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS FOR REFORM

1. INTRODUCTION

In this chapter, we begin by making certain recommendations respecting the law of covenants generally. We consider first, two fundamental issues that, together, will provide the essential basis for the proposals made in the remainder of this Report. Specifically, we consider: (1) whether, in view of the many difficulties associated with the equitable doctrine of restrictive covenants, such covenants should be retained; and (2) whether, and under what circumstances, the burden of positive covenants should be allowed to run with land. We then consider, in rather more general terms, the type of approach to be taken to reform of this area of the law. Finally, after making our recommendations concerning these broad principles of reform, we make a number of specific recommendations for reform of the law of covenants.

2. GENERAL RECOMMENDATIONS

(a) Restrictive Covenants

In its Report,[1] the United Kingdom Royal Commission on Legal Services expressed the view that restrictive covenants clutter the title of residential property and "bedevil modern conveyancing".[2] It added that restrictive covenants are often difficult to construe, and suggested that there is doubt about their enforceability and the necessity of estate schemes under modern planning law.[3] The Royal Commission concluded, therefore, that restrictive covenants should be made unenforceable, except between the original parties, unless the restrictions are necessary to secure privacy, and are made in accordance with prescribed standard forms.[4]

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[1] United Kingdom, Royal Commission on Legal Services, *Report* (Cmnd. 7648, 1979).

[2] *Ibid.*, Vol. 1, Annex 21.1, para. 3, at 283.

[3] *Ibid.*

[4] *Ibid.*

The view that restrictive covenants bedevil conveyancing undoubtedly has some force in the English context. With a much larger population, concentrated in an area smaller than Ontario, there is clearly a greater perceived need in England to resort to restrictive covenants for the purpose of private planning. Moreover, the fact that England lacks condominium legislation means that restrictive covenants are required, to a much greater extent, to provide for various common law flat schemes.

The English Law Commission, in its 1984 Report,[5] rejected the view that restrictive covenants "bedevil modern conveyancing" to the extent suggested by the Royal Commission. It acknowledged that there were problems concerning the interpretation of restrictive covenants, but concluded that these concerns were not of sufficient magnitude to warrant the prohibition of such covenants.[6] It further suggested that an absolute prohibition of restrictive covenants would be unfairly prejudicial to those who currently enjoyed the benefit of such covenants and, conversely, would provide a windfall to those who currently were subject to the burdens of restrictive covenants.[7] The English Commission also rejected the proposal requiring the mandatory use of prescribed forms of restrictive covenants.[8]

Admittedly, the criticism that restrictive covenants unduly complicate conveyancing also has some validity in the Ontario context. However, we are of the view that this is a function, not of any complexities inherent in the nature of restrictive covenants themselves, nor of their unascertainability;[9] rather, it is a function of the complexity and uncertainty of the existing law applicable to such covenants. The problem is exacerbated, moreover, by the fact that the burden of positive covenants does not run on a transfer of freehold land. In an attempt to circumvent this rule, conveyancers often seek to impose positive covenants in the guise of restrictions. The interpretation difficulties that result from this practice frequently cause delays in conveyancing. For example, the provisions might become the subject of a vendor and purchaser application. Thus, to the extent they do so, restrictive covenants prejudicially affect the conveyancing process not only because of the complexity and uncertainty of the law respecting such covenants, but also because of the inadequacy of the law respecting positive covenants.

In order to respond to the argument that planning legislation may have supplanted the need for restrictive covenants, the English Law Commission

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[5] England, The Law Commission, *Transfer of Land*[:] *The Law of Positive and Restrictive Covenants*, Law Com. No. 127 (1984) (hereinafter referred to as "English Report").

[6] *Ibid.*, para. 2.4, at 5.

[7] *Ibid.*, para. 2.12, at 7.

[8] *Ibid.*, paras. 2.14-2.17, at 8.

[9] The land registration systems in effect in Ontario ensure that restrictive covenants are readily ascertainable.

quoted[10] the following extract from the preface to the sixth edition of Preston and Newsom's text on restrictive covenants:[11]

> One thing that is abundantly plain is that there is no prospect whatever that restrictive covenants will become unnecessary and that their place will be taken by the planning laws. For planning standards are still too often below the standards imposed by restrictive covenants. Thus, in *Re Bass Ltd.'s Application* the Lands Tribunal held that the suggested modification would inflict upon the persons entitled to the benefit of the restriction noise, fumes, vibrations, dirt and the risk of accidents: these proposals had received planning permission. Again, in the *Wrotham Park* case it was the local authority itself which, having bought the land for a very small sum, put it up for sale and received £90,000 on the basis that it was to be built upon, thereby destroying an open space which the owners of surrounding houses valued and which had been deliberately created by the original covenantee.

The English Commission concluded that, while planning law overlaps, to some extent, with restrictive covenants, it is unable to fulfil the many needs of residential property developments.[12] Moreover, the Law Commission concluded that it would not be realistic to extend the ambit of planning law to take the place of private restrictions.[13] Planning law paints with an extremely broad brush, and it is therefore unsuited to the task of resolving the finer details. The planning authorities do not have the wherewithal to regulate the interests of adjoining landowners, and it would be unreasonable to expect them to do so.[14] Further, planning restrictions are enforceable only by municipal authorities, whereas landowners undoubtedly would prefer to be able to enforce restrictive covenants themselves.[15]

As a result of the smaller population base, and the larger geographical area, restrictive covenants are not used as widely in Ontario as they are in England. Nevertheless, as is evident from the case law canvassed in chapter 2, they are quite common. Therefore, the conclusions drawn by the English Law Commission regarding the desirability of restrictive covenants, and the inability of planning law to regulate land use with the precision and detail permitted by restrictive covenants, apply with similar force in Ontario. Moreover, we believe that it is likely that many people in this province would find it objectionable if the ambit of planning legislation were widened to the extent necessary to enable it to regulate land use obligations among neighbours.

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[10] English Report, *supra*, note 5, para. 2.5, at 6.

[11] Preston and Newsom, *Restrictive Covenants Affecting Freehold Land* (6th ed., 1976), at vi. While there is no similar statement in the preface to the seventh edition of this work, published in 1982, it is evident from the text as a whole that the authors' views have not changed on this point.

[12] English Report, *supra*, note 5, para. 2.5, at 5-6.

[13] *Ibid.*, para. 2.6, at 6.

[14] *Ibid.*

[15] *Ibid.*, para. 2.7, at 6.

We have concluded, therefore, that restrictive covenants perform a socially useful function and we recommend that they should be retained. However, we further recommend that the existing equitable doctrine of restrictive covenants should be reformed to remove the present complexity and uncertainty. Our specific recommendations to accomplish these objectives are set out below.[16]

(b) The Burden of Positive Covenants

If there is any problem in Ontario that can be said to bedevil modern conveyancing, it is that the burden of positive covenants cannot run with freehold land, either in the context of land developments, or in the context of a simple agreement between neighbours.

We note at the outset that, unlike the burden of positive covenants, the benefit of such covenants is capable of running upon a transfer of freehold land. Hence, an assignee of the dominant land may sue the covenantor for breach of a positive covenant, but she cannot sue the covenantor's assignee.[17] It was entirely fortuitous, therefore, that, in *Smith v. River Douglas Catchment Board*,[18] the owners and occupiers of the dominant land, who were assignees of the covenantee, were able to sue the Board for breach of its obligation to maintain the river banks. They were able to do so only because the Board was the original covenantor. Had the Board assigned the servient lands, no remedy would have been available.

A number of objections have been raised to the running of the burden of positive covenants. One of the primary reasons the burden has not been permitted to run with the land in England is the concern that anyone dealing with the burdened land would have difficulty ascertaining the existence of the covenant.[19] However, this has never been a concern in Ontario, since a system of land registration has existed in Ontario since the province was created.[20]

It has also been argued, particularly in the United States, that positive as well as restrictive covenants tend to render land inalienable because they impose burdens upon land. For a time, therefore, American law disfavoured the running of such burdens, although it took somewhat less objection to the running of the corresponding benefits.[21] It has now been generally recognized, however, that such restrictions do not tend to render land inalienable.

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[16] *Infra*, this ch., sec. 3.

[17] See, generally, *supra*, ch. 2, sec. 4.

[18] [1949] 2 K.B. 500, [1949] 2 All E.R. 179 (C.A.). See the discussion of this decision *supra*, ch. 2, sec. 4(b)(ii).

[19] See *supra*, ch. 2, sec. 4(c)(i).

[20] *Ibid*.

[21] See *supra*, ch. 3, sec. 5(a)(ii)d.

On the contrary, positive and negative covenants tend to enhance alienability since they operate to protect the amenities of neighbourhoods and the competitiveness of businesses.

As a practical matter, the use of affirmative covenants is relatively common, particularly in connection with land developments. Positive covenants, for example, are often contained in subdivision agreements, entered into between developers and municipalities. In this context, however, positive covenants create few problems, since they have the sanction of statute.[22] The situation is otherwise, however, with respect to covenants given by builders to the subdivider. Frequently these include positive obligations, for example, with respect to paving, sodding, and the installation of street lights. Even though builders' covenants are usually limited in time to ten or twelve years, the fact that the burden of a positive covenant does not survive an assignment of the land by the builder can cause difficulties. Similarly, covenants are often imposed upon the ultimate purchasers, either by the subdivider or by the builder. Again, they often contain positive as well as negative obligations. Once again, however, even though these obligations are usually restricted in time to ten or twelve years, the fact that the burden of a positive covenant cannot run with the land may create difficulties.

Finally, we note that the running of the burden of positive covenants is not a phenomenon entirely unknown to the law. Since privity of estate exists between a lessor and a lessee, and their respective assigns, the burden of certain leasehold covenants will run, either with the term of the lease or with the reversion, irrespective of whether the obligation is positive or negative.[23]

In addition, the burden of positive covenants are permitted to run in the context of condominiums, which are governed in Ontario by specific legislation.[24] However, there are many situations in which condominium legislation might not be appropriate—for example, in the case of a duplex, or other building having more than one owner, that is not large enough to be made into a statutory condominium. Like the owners of condominium units, the owners of the several units in such buildings might wish to enter into positive covenants that run with the land, particularly respecting such matters, for example, as the maintenance of common walls, decoration and landscaping.

We have reached the conclusion that the present law, which prohibits the running of the burden of positive covenants upon a transfer of freehold land, operates to defeat the legitimate expectations of the parties. In our view, there can be no principled rationale for a rule that would preclude neighbours from agreeing, for example, to maintain a boundary fence, or, to keep certain drains clear, such that the covenant would run with the land.

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[22] See *Planning Act, 1983*, S.O. 1983, c. 1, s. 50(6).

[23] See, generally, *supra*, ch. 2, sec. 3(b).

[24] *Condominium Act*, R.S.O. 1980, c. 84, discussed *supra*, ch. 2, sec. 4(c)(ii).

Nor is it justifiable, in our view, that, in a property development providing for parks, open spaces, and other amenities, obligations to pay for the maintenance of these amenities cannot be enforced against the successors of the original contracting parties.[25] In addition, to the extent that a variety of methods have been developed to circumvent the undesirable effect of the present law,[26] it has been productive of much uncertainty and confusion. For the foregoing reasons, the Commission recommends that the law should be reformed to permit the burden of affirmative obligations to run upon a transfer of freehold land.

(c) Approaches to Reform

The above recommendations could be accomplished by either of two different approaches to reform. The first approach would reform the law of covenants only. Specifically, it would reform the law to enable the burden of positive covenants to run with land, and it would rationalize the law of restrictive covenants. The second approach would consolidate, to the extent possible, not only positive and restrictive covenants, but also easements and *profits à prendre*, into a single unified law of servitudes.

This second approach has much to recommend it. Many of the principles of the several servitudes are the same, while many of the differences, which arose for historical reasons, could be abolished. For example, it would appear that, in effect, the spurious easement of fencing[27] is only a positive covenant that has escaped the law's spurning of the running of the burden of positive covenants.[28] Similarly, negative easements, such as the right to light or air, can be imposed as well by restrictive covenants. Indeed, any similar rights, other than those already recognized by law as negative easements, would probably have to take effect as restrictive covenants, since the law has been wary of creating any new negative easements.[29]

Another example of the desirability of the broader approach is provided by the uncertainty surrounding the law governing party walls. If there has

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[25] It is true, of course, that positive obligations remain enforceable against the covenantor personally. However, it might not be fair to enforce the obligation against the original contracting party after she has sold the servient land, and has no control over the property.

[26] See *supra*, ch. 2, sec. 4(c)(ii).

[27] But see Megarry and Wade, *The Law of Real Property* (5th ed., 1984), at 908, where it is said:

> The right to require a neighbouring landowner to repair his fences has been called a 'spurious easement,' and even a 'quasi-easement.' In fact it appears to be an easement, though exceptional in requiring positive action by the servient owner.

[28] See, for example, *Jones v. Price*, [1965] 2 Q.B. 618, [1965] 2 All E.R. 625 (C.A.), and *Crow v. Wood*, [1970] 3 W.L.R. 516, [1970] 3 All E.R. 425 (C.A.).

[29] See, for example, *Phipps v. Pears*, [1965] 1 Q.B. 76, [1964] 2 All E.R. 35 (C.A.). Thus, for example, rights to shelter, shade, or a view, can be imposed only by restrictive covenant.

been common user of a party wall and the origin of the wall cannot be ascertained, *prima facie* the wall is held by the adjoining owners as tenants in common, with rights of partition, either subject or not subject to cross easements.[30] However, a party wall may also be regarded as divided longitudinally into two parts, one belonging to each neighbour, with or without cross easements of support, or as a wall belonging entirely to one of the neighbours, with an easement or right in the other to have it maintained as a dividing wall.[31] In fact, the rights and obligations respecting party walls could be created by easements and restrictive covenants, as well as by positive covenants, if the burden of such covenants were made to run with the land.

Not only do the law of easements and the law of covenants overlap, but the law of easements and *profits à prendre* itself might benefit from reform. It might be desirable, therefore, to accomplish all of these objectives through the creation of a single comprehensive law of servitudes. Indeed, this approach was favoured by the English Law Commission, in its 1971 working paper,[32] as well as by various American commentators.[33] Moreover, it was adopted, at least in part, in Trinidad and Tobago.[34] Nevertheless, like the English Commission,[35] we have concluded that such an approach would be overly ambitious within the limited context of the present Report. Although we do not wish to preclude the eventual assimilation of the several servitudes, we have determined that the proposals for reform made in this Report should deal only with positive and restrictive covenants, and should not address easements or *profits à prendre*.

Accordingly, we adopt the first approach described above, and our specific recommendations follow to permit the burden of positive covenants to run with land, and to reform the law of covenants generally.

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[30] *Lewis v. Allison* (1899), 30 S.C.R. 173. In England, since 1925, all party walls held by neighbouring owners as tenants in common are deemed to be severed vertically, subject to such cross rights of support and user over the rest of the wall as would be necessary to confer upon the neighbours rights corresponding to those they would have had if they had been tenants in common: *Law of Property Act 1925*, 15 & 16 Geo. 5, c. 20 (U.K.), s. 38(1). See, also, Megarry and Wade, *supra*, note 27, at 464.

[31] See Oosterhoff and Rayner, *Anger and Honsberger*[:] *Law of Real Property* (2d ed., 1985) (hereinafter referred to as "Anger and Honsberger"), Vol. 2, §1805.4, at 957-58.

[32] England, The Law Commission, *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971).

[33] See *supra*, ch. 3, sec. 5(b).

[34] See *supra*, ch. 3, notes 115 and 136.

[35] English Report, *supra*, note 5, para. 1.6, at 3.

3. SPECIFIC RECOMMENDATIONS

(a) INTRODUCTION

Earlier in this chapter we expressed our view that the present law of restrictive covenants is unduly complex and productive of much uncertainty. We also concluded that there is a serious gap in the law, namely, that the burden of positive covenants cannot run upon the transfer of freehold land.[36] It would not be sufficient, however, merely to reform the law of restrictive covenants and provide that it should apply equally to positive covenants. The law of restrictive covenants is inherently incapable of providing adequately for positive obligations.

For example, since the burden of restrictive covenants generally runs only in equity, only equitable remedies are normally available for their enforcement.[37] Of course, this rarely causes difficulty since an injunction is ordinarily the most appropriate remedy by which to enforce a negative obligation. Positive covenants, on the other hand, are enforced most appropriately by legal remedies, particularly damages.

Similarly, since a restrictive covenant merely requires a person to refrain from specified conduct, it might not be objectionable to require anyone who is in occupation of the land to comply with the restriction. By contrast, a positive covenant could require the expenditure of money or the performance of some onerous duty. Thus, it might very well be improper to require a person with a limited interest in the servient land, such as a short-term lessee, to comply with the terms of such an obligation.

It would not be sufficient, therefore, merely to reform the law of restrictive covenants and make it applicable to positive covenants. Accordingly, we have concluded that a new type of servitude should be created that would encompass both positive and negative obligations, and would provide for the differing requirements of each. In this regard we have had the benefit of the thoughtful and detailed recommendations of the English Law

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[36] *Supra*, this ch., secs. 2(a) and (b).

[37] Although restrictive covenants are most often enforced in equity, they are enforceable at law in the following circumstances:

(a) between the original parties, since there is privity of contract;

(b) by a successor of the covenantee against the original covenantor, since the benefit of a covenant (whether positive or restrictive) may run with the land at law;

(c) by an assignee of the benefit from the covenantee, against the original covenantor, since, like any chose in action, the benefit of a covenant can be assigned expressly; and

(d) by the original covenantee or successor against the successor of the covenantor, where there is privity of estate.

See, generally, *supra*, ch. 2, secs. 1-4.

Commission.[38] In many respects they present a workable model that can be adapted for use in Ontario. In particular, we find compelling the English Commission's recommendation for a unified concept of a "land obligation", comprising both affirmative and negative obligations, and its simplification and rationalization of the law of restrictive covenants. Indeed, the scheme that follows, in large measure, is the one proposed in the English Report, modified, where necessary, to account for the specific Ontario context. Nevertheless, as we shall discuss below, our recommendations differ from those of the English Law Commission in a number of important respects.

(b) The Land Obligation

(i) General

In accordance with the above, the Commission recommends that a new interest in land, to be called a "land obligation", should be created in Ontario.[39] This new interest should comprehend both positive and restrictive obligations, and should permit both the benefit[40] and the burden of such obligations[41] to run upon a transfer of freehold land. Moreover, like other incorporeal interests in land, a land obligation should be capable of existing as a legal or equitable estate in fee simple, for life, or for a term of years.[42]

(ii) The Necessity of Distinguishing Between Classes of Land Obligations

The English Law Commission recommended that land obligations should be divided into "neighbour obligations" and "development obligations", the latter operating only under "development schemes".[43] The need for two separate classes of obligation arose out of the Law Commission's

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[38] See, generally, English Report, *supra*, note 5.

[39] See, generally, *ibid.*, paras. 4.22 and 5.2-5.4, at 33 and 37.

[40] As we discuss *infra*, this ch., sec. 3(b)(iv), the benefit of a land obligation should be permitted to exist either as appurtenant to land or in gross.

[41] The types of obligation that may be imposed as a land obligation are discussed *infra*, this ch., sec. 3(c).

[42] Under the English proposals the interest would similarly be capable of subsisting as either a legal or an equitable interest; however, it would be capable of subsisting as a legal interest only if it were equivalent to an estate in fee simple absolute in possession or to a term of years absolute: English Report, *supra*, note 5, paras. 5.2 and 8.4, at 37 and 60. In England, this latter condition must be fulfilled by all comparable interests in real property, if they are to exist as legal interests: *Law of Property Act 1925*, *supra*, note 30, s. 1(2)(a).

[43] English Report, *supra*, note 5, paras. 6.1-6.19, at 38-43.

desire to provide for the creation of land obligations in essentially two different contexts. Not only were land obligations intended for use in the ordinary and relatively straightforward case of neighbouring landowners who wished to impose obligations on their respective parcels of land, but they were also intended for use in the more complicated case of the sale of freehold flats and other property developments.[44] As a result, the Law Commission's recommendations, in our opinion, became excessively complex, something that could have been avoided by the adoption of specific condominium legislation to provide for the running of the burden of positive obligations in the context of the sale of freehold flats.

While the complexity associated with the creation of two separate classes of land obligation would seem to have been necessary in England, which lacks condominium legislation, we are of the view that it is neither necessary nor desirable to import this complexity into Ontario, which has enacted such legislation.[45] On the other hand, certain aspects of the "development scheme" proposal are of use in the context of building schemes, discussed below.[46]

(iii) The Necessity of Land Obligations Being Appurtenant to an Estate

The English Law Commission emphasized that, under their proposals, land obligations would not be appurtenant to the land itself; rather, they would be appurtenant to an estate in the land.[47] As we discussed earlier, this is true at common law of the benefit of a positive covenant, which runs, not with the land itself, but with an estate therein.[48] However, as we also discussed, this concept has been eroded. By statute, a covenant is enforceable by an assignee, even though she does not have the same legal estate in the land as the assignor had.[49]

The issue does not appear to have arisen directly in connection with restrictive covenants, which are regarded simply as interests in land. It has arisen indirectly, however, in connection with the question whether adverse possessors are bound by restrictive covenants. It may be argued that, since an adverse possessor is not a successor to the estate of the person dispossessed, an adverse possessor would not be bound by a restrictive covenant if it were appurtenant merely to an estate in the land. An adverse possessor

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[44] *Ibid*. See, also, *ibid*., paras. 4.29-4.36, at 35-36.

[45] *Condominium Act*, *supra*, note 24.

[46] See *infra*, this ch., sec. 3(d).

[47] English Report, *supra*, note 5, paras. 8.17-8.19 and 8.23-8.24, at 63 and 64. See, also, *ibid*., paras. 10.3 and 10.6, at 74 and 75.

[48] See *supra*, ch. 2, secs. 3(b)(ii) and 4(b)(ii).

[49] See *supra*, ch. 2, sec. 4(b)(ii), discussing the *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 51, s. 24(1), and the *Law of Property Act 1925*, *supra*, note 30, s. 78(1).

would be bound by a restrictive covenant only if it were appurtenant to the land itself. Since adverse possessors are indeed bound by restrictive covenants, as we discussed earlier,[50] it would appear by implication that such restrictions are appurtenant to the land itself, rather than to an estate therein. Similarly, in the United States, it would seem that while a real covenant runs with an estate in land, an equitable servitude runs with the land itself. Thus, it has been suggested that, although an adverse possessor would not take subject to the former, she would take subject to the latter.[51]

On the other hand, it may be argued that a restrictive covenant, like the benefit of a positive covenant, is appurtenant merely to an estate in land. Like restrictive covenants, it is customary to refer to easements as being appurtenant to land, although it has been pointed out that, in fact, easements are appurtenant merely to an estate in the land.[52] In the usual case, where an easement is granted by the owner of the fee simple, the practical effect is as if the easement were appurtenant to the land. Where, however, an easement is granted by a lessee or a life tenant, it will exist only for the duration of the lease or the life of the life tenant, respectively. This would suggest that the interest is appurtenant to the estate in the land, rather than to the land itself. The same would appear to be true of a restrictive covenant, since it can also be granted by the owner of a lesser estate, although it is normally granted by the owner of the fee simple.

In order to provide for the granting of land obligations by the owners of lesser estates, and to ensure that superior estates do not take subject to such obligations, the English Law Commission recommended that both the dominant and the servient estates, which it refers to as the benefiting and burdened estates, respectively, should be identified expressly or impliedly in the instrument creating the obligation.[53] The benefit of a land obligation would be appurtenant to the benefiting estate[54] in the dominant land, and the burden of a land obligation would be appurtenant to the burdened estate[55] in the servient land.

We have concluded that the solution adopted by the English Commission is unnecessarily complex. In a subsequent section of this chapter,[56] we shall recommend a statutory priority provision that, in our view, adequately addresses the problem identified above. In this section, therefore, the

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[50] See *supra*, ch. 2, sec. 5(a).

[51] See *supra*, ch. 3, sec. 5(a)(iii)a.

[52] Jackson, *The Law of Easements and Profits* (1978), at 205.

[53] English Report, *supra*, note 5, paras. 8.17-8.19, 8.23-8.24, 10.3, 10.6, 11.12, and 11.16, at 63-64, 74-75, and 79-80.

[54] The benefiting estate is said to be "the estate in the dominant land the owner of which is primarily entitled to enforce [a land obligation]": *ibid.*, para. 10.3, at 74.

[55] The burdened estate is said to be "the legal estate in the servient land which enables the creator of the land obligation to create it": *ibid.*, para. 11.16, at 80.

[56] See *infra*, this ch., sec. 3(g).

Commission recommends that the benefit of a land obligation, other than the benefit of a land obligation that exists in gross,[57] should be appurtenant to, and run with, the dominant land, not with an estate therein. Similarly, the Commission recommends that the burden of a land obligation should be appurtenant to, and run with, the servient land, not with an estate therein.

(iv) Land Obligations in Gross

As we indicated in the preceding section, the English proposals require that not only the burden, but also the benefit, of a land obligation must be appurtenant to an estate in land. In this section we consider whether the benefit of a land obligation should be permitted to exist independently, that is, without the necessity, of a dominant tenement.

It is clear that *profits à prendre* may exist either as appurtenant to land or in gross.[58] By contrast, in Anglo-Canadian law, easements[59] and restrictive covenants[60] are appurtenant rights. In the United States, however, it would appear that easements may exist in gross.[61] It would also appear that there is substantial authority in American law for permitting equitable servitudes to exist in gross.[62]

One of the reasons for the requirement in Anglo-Canadian law that the benefit of a restrictive covenant must be appurtenant to land, and cannot exist in gross, derives from the rationale underlying the equitable doctrine of restrictive covenants. Such covenants were recognized in order to permit the covenantee to preserve the value of her land in the neighbourhood.[63] In *London and South Western Railway Co. v. Gomm*,[64] Jessel M.R. was of the view that, rightly considered, the doctrine in *Tulk v. Moxhay*[65] is "either an

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[57] A land obligation that exists in gross is one that is enforceable by the owner in her personal capacity, rather than in her capacity as owner of land. In the next section of this chapter, we shall recommend that the benefit of land obligations should be permitted to exist either as appurtenant to land or in gross.

[58] See Anger and Honsberger, *supra*, note 31, Vol. 2, §1812.4, at 975, and Megarry and Wade, *supra*, note 27, at 834, and 852-53.

[59] See Anger and Honsberger, *supra*, note 31, Vol. 2, §1803.2(a), at 925-26, and Megarry and Wade, *supra*, note 27, at 834-35. It should be noted, however, that, by statute, easements may exist in gross. See, for example, *Land Title Act*, R.S.B.C. 1979, c. 219, s. 214, and *Real Property Act*, R.S.M. 1970, c. R30, s. 106(1), as am. by S.M. 1976, c. 28, s. 5, and S.M. 1986-87, c. 4, s. 70.

[60] See *supra*, ch. 2, sec. 5(b)(ii).

[61] American Law Institute, *Restatement of the Law of Property* (1944), Vol. 5, §§454 and 489-96, at 2917-19 and 3040-59.

[62] See *supra*, ch. 3, sec. 5(a)(iii)b. See, also, Clark, "The Assignability of Profits and Equitable Restrictions" (1928-29), 38 Yale L.J. 139.

[63] *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143 (Ch.).

[64] (1882), 20 Ch. D. 562, at 583, [1881-85] All E.R. Rep. 1190, at 1195 (C.A.).

[65] *Supra*, note 63.

extension in equity of the doctrine of *Spencer's Case* to another line of cases, or else it is an extension in equity of the doctrine of negative easements". The Court of Appeal, in *London County Council v. Allen*,[66] confirmed the rule that a restrictive covenant is enforceable under the doctrine in *Tulk v. Moxhay* only if the covenantee has land for the benefit of which the covenant was taken. In that case, Buckley L.J. adopted and expanded upon the dictum of Jessel M.R. He stated that "[t]he doctrine is either an extension in equity of the doctrine in *Spencer's Case* (in which ownership of land by both covenantor and covenantee is essential) or an extension in equity of the doctrine of negative easements, a doctrine applicable not to the case of easements in gross, but to an easement enjoyed by one land upon another land".[67]

In our view, neither theory provides a compelling rationale for equity's insistence that the benefit of a restrictive covenant must exist as appurtenant to land. The analogy to covenants running with the land at law, based upon the doctrine in *Spencer's Case*, is not particularly persuasive since that case concerned a lessor-lessee relationship. Although both parties in that case had an interest in land, both interests were in the same land. On the facts, therefore, *Spencer's Case* neither involved, nor required, two *separate* parcels of land. Moreover, the decision in that case depended upon the existence of privity of estate. Since privity of estate exists only between lessor and lessee, the existence of privity of estate necessarily presupposes the existence of two interests in a single parcel of land. By contrast, the enforcement of a restrictive covenant does not depend upon the existence of privity of estate. Accordingly, it could be argued, the enforcement of a restrictive covenant ought not to require the existence of two interests in land.

The second theory, that the equitable doctrine in *Tulk v. Moxhay* developed by analogy to the law of easements, is equally unpersuasive. As one commentator has suggested:[68]

> [T]he conclusion of appurtenance in restrictive covenants is drawn from an analogue, the easement, which seems no more compelling than other rights which lack that requirement; the presence of the requirement in the analogue itself is questionable in derivation and policy; and the resultant requirement in restrictive covenants is not identical with that in the analogue.

It has been pointed out that the cases relied upon by the English courts, as authority for the proposition that easements cannot exist in gross, are relatively weak, and that the proposition was not of ancient origin, it having

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[66] [1914] 3 K.B. 642, [1914-15] All E.R. Rep. 1008 (C.A.) (subsequent reference is to [1914-15] All E.R. Rep.).

[67] *Ibid.*, at 1015.

[68] Gardner, "The Proprietary Effect of Contractual Obligations Under *Tulk v. Moxhay* and *De Mattos v. Gibson*" (1982), 98 L.Q. Rev. 279, at 307.

been adopted only late in the nineteenth century.[69] Indeed, the rule with respect to easements itself has been the subject of some criticism.[70] It has been argued that if there is a socially acceptable use of land that requires recognition of an easement in gross to protect the parties, there is no compelling policy reason why an easement in gross should not be permitted,[71] for, as stated in an early case, "[t]he category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind".[72]

The above comments are particularly relevant to covenants. As we noted earlier,[73] there are a number of situations in which some Canadian jurisdictions have provided by statute for easements in gross in favour of public bodies. However, with the exception of planning legislation (which, in any event, does not provide for the running of the burden of positive covenants generally, but does so only in limited circumstances),[74] there is no similar legislation respecting covenants. It is apparent from the case law examined earlier in this Report[75] that there have been a number of situations in which municipalities, because they owned no dominant land, were unable to enforce restrictive covenants against successors in title to lands purchased from them, in circumstances in which it would have been desirable to permit enforcement of the covenants.

Even in situations involving private restrictions, the inability to create a covenant in gross causes difficulties. For example, a homeowners' association under a building scheme would not have the right to enforce any restriction imposed by the scheme unless it owned lands that are benefited by the covenant.[76]

We acknowledge that there might be situations in which the owner of the benefit of a covenant in gross would be unable to derive any real or substantial benefit from the covenant. In these cases, it would not be desirable to permit land to be burdened by such covenants. However, we have concluded that this problem could be overcome through the provision of a wider power of discharge and modification. Accordingly, later in this chapter, we recommend enactment of a statutory provision that, among

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[69] Anger and Honsberger, *supra*, note 31, Vol. 2, §1803.2(a), at 926.

[70] See, for example, Sturley, "Easements in Gross" (1980), 96 L.Q. Rev. 557; Anger and Honsberger, *supra*, note 31, Vol. 2, §1803.2(a), at 926; Megarry and Wade, *supra*, note 27, at 835; and Maurice (ed.), *Gale on Easements* (14th ed., 1972), at 6-8 and 42-43.

[71] McClean, "The Nature of an Easement" (1966), 5 U.W. Ont. L. Rev. 32, at 40-42.

[72] *Dyce v. Hay (Lady)* (1852), 1 Macq. 305 (H.L.), at 312-13.

[73] See *supra*, note 59.

[74] See *supra*, ch. 2, sec. 4(c)(ii).

[75] See *supra*, ch. 2, sec. 5, especially sec. 5(b)(ii).

[76] *Ibid*. See, also, *Re British United Automobiles Ltd. and Volvo Canada Ltd*. (1980), 29 O.R. (2d) 725, 114 D.L.R. (3d) 488 (H.C.J.).

other things, would confer jurisdiction on the court to extinguish land obligations in gross where the owner of the benefit enjoys no real or substantial benefit from the covenant.[77]

We are of the view, therefore, that the benefit of land obligations should be permitted to exist either as appurtenant to land or in gross, and we so recommend.

(c) The Content of Land Obligations

Thus far, we have recommended that land obligations should comprehend both positive and negative obligations,[78] and that the benefit of land obligations should be permitted to exist either as appurtenant to land or in gross.[79] We now turn to consider the specific content of land obligations.

The English Law Commission proposed that four kinds of obligation should be capable of existing as neighbour obligations:[80] (1) restrictive obligations, which would be comparable to restrictive covenants; (2) positive obligations requiring the carrying out of works on the servient or the dominant land for the benefit of the dominant land; (3) positive obligations requiring the provisions of services for the benefit of the dominant land; and (4) reciprocal payment obligations, which would require the making of payments on account of expenditures incurred, or to be incurred, by a person complying with a positive obligation. The need to distinguish between the various types of land obligation arose out of the view that certain kinds of obligation, such as an obligation to pay money or to take some other positive action, should not be enforceable against persons having only a limited interest in the land.[81] By contrast, it may be noted that the legislation in Trinidad and Tobago does not make these distinctions, and thus allows all obligations to be enforced against the owner or occupier of the servient land.[82] We agree with the English Law Commission that, indeed, it would be inappropriate to subject owners of limited interests to certain positive obligations, and our recommendations have been formulated to prevent such a result.

As we noted in the preceding paragraph, the English Law Commission recommended that four kinds of obligation should be capable of existing as neighbour obligations. In our view, two further types of obligation should be capable of being imposed as a land obligation under our recommendations. These additional types, derived from the list of obligations the English

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[77] See *infra*, this ch., sec. 3(l)(iv).

[78] See *supra*, this ch., sec. 3(b)(i).

[79] See *supra*, this ch., sec. 3(b)(iv).

[80] English Report, *supra*, note 5, para. 6.6, at 38-39. See, also, *supra*, ch. 3, sec. 2(b).

[81] See English Report, *supra*, note 5, paras. 6.5 and 11.4-11.13, at 38 and 78-80.

[82] *Land Law and Conveyancing Act, 1981*, Stats. Trin. & Tob., 1981, No. 20, s. 118(1).

Commission proposed should be capable of being imposed as development obligations,[83] are as follows: (1) obligations requiring the servient land to be used in a particular way for the benefit of the dominant land ("positive user" obligations); and (2) obligations to provide access to the servient land. The former, in essence, is the opposite of a restrictive obligation. The Law Commission wished to make provision, among other things, for obligations that could reasonably be imposed upon tenants in a leasehold development, but concluded that such an obligation might be used oppressively if it could be imposed as a neighbour obligation.[84] Accordingly, the English Commission concluded that such an obligation should be imposed only as a development obligation. In our opinion, however, this concern is unwarranted since, ultimately, market forces will dictate the kinds of obligation that can be imposed.

With respect to the second additional type of obligation, the Law Commission wanted to make provision for the giving of access to a manager under a development scheme, but concluded that, as between neighbours, an obligation of this kind could be imposed by easement.[85] While this may be so, it seems to us desirable to allow a right of access to be given to permit performance of positive obligations upon the servient land.

In addition, the Commission is of the view that a right to make any other kind of positive or negative obligation should be included to provide for future exigencies.[86]

The Commission therefore recommends that any obligation should be capable of being imposed as a land obligation, including:

(1) restrictive obligations;

(2) positive obligations;

(3) reciprocal payment obligations;

(4) positive user obligations; and

(5) access obligations.

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[83] English Report, *supra*, note 5, para. 6.10, at 39-40. Earlier we indicated that, while the creation of two separate classes of land obligation (that is, neighbour obligations and development obligations) would seem to have been necessary in England, it is neither necessary nor desirable to import this complexity into Ontario. See *supra*, this ch., sec. 3(b)(ii).

[84] English Report, *supra*, note 5, para. 6.12, at 41.

[85] *Ibid.*, para. 6.14, at 41.

[86] See, for example, the Trinidad and Tobago legislation, *supra*, note 82, s. 118(1)(d).

After defining the types of obligation that could be imposed as a land obligation, the English Commission recommended that it should be possible to include in the instrument creating the land obligation the following types of supplementary provision, which should take effect as part of the land obligation:[87]

(a) *Information*. A provision giving a right to information (for example, as to the current ownership of the servient land) or to the production of documents (for example, those dealing with changes in its ownership).

(b) *Inspection*. A provision enabling any person entitled to enforce a land obligation to inspect the servient land in order to see whether it has been complied with.

(c) *Self-help*. A provision enabling anyone entitled to enforce a land obligation requiring the carrying out of works to enter the servient land and carry them out himself in the event of non-compliance....

(d) *Fund*. A provision relating to the keeping of a fund out of which expenditure on the carrying out of works, or the provision of services, is to be met. A provision of this kind can be made whenever a works or services obligation is coupled with a reciprocal payment obligation, and can be made to take effect as part of either obligation.

(e) *Interest*. A provision requiring the payment of interest if default is made in complying with a reciprocal payment...obligation.

(f) *Charge*. A provision imposing a charge on the servient land for certain money which becomes due as a result of the non-performance of a reciprocal payment or reimbursement obligation or of an obligation requiring the carrying out of works.

Subject to the exception noted below, the Commission similarly recommends that it should be possible to include these supplementary provisions in the instrument creating a land obligation, and that they should take effect as part of the land obligation. In our view, however, the charge provision should not be permitted. We have concluded that the remedies otherwise available on a breach of a land obligation[88] are sufficiently broad to render such a provision unnecessary.

(d) Development Schemes

Earlier in this chapter[89] we indicated that, in our view, it was unnecessary to provide for the creation of two separate classes of land obligation.

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[87] English Report, *supra*, note 5, para. 6.16, at 42.

[88] See *infra*, this ch., sec. 3(i).

[89] See *supra*, this ch., sec. 3(b)(ii).

The bifurcation of land obligations into neighbour obligations and development obligations might have been necessary in England, but we concluded that it was neither necessary nor desirable in Ontario. Nevertheless, we are of the view that specific provision should be made for what are currently referred to as building schemes. Such schemes are usually imposed by developers of residential or recreational subdivisions in advance of the sale of individual building lots. The obligations imposed under the scheme become binding upon, and mutually enforceable by, the subsequent purchasers of the respective lots. Moreover, these schemes might be of use in small condominium-like developments where resort has not been made to the statutory condominium scheme. Since the English recommendations are designed principally for condominiums, we need not provide for such schemes with the same level of detail.[90] However, some aspects of those recommendations might be useful in Ontario, including the designation "development scheme".

The Commission recommends, therefore, that provision should be made for the creation of development schemes, under which land obligations might be imposed and become binding upon, and mutually enforceable by, the owners of the individual units comprising the scheme. The Commission further recommends that any person should be permitted to create a development scheme by a signed instrument in writing. Contrary to the English recommendations,[91] however, we have concluded that the instrument should define the land obligations to be imposed thereunder, the content being the same as for land obligations generally, and, as we shall recommend below, it should define the land to which it applies with the particularity required by the land registration statutes.

The dominant land and the servient land in respect of each land obligation imposed under a development scheme should be the specific unit or units benefited or bound by the particular obligation. With respect to the servient land, this recommendation is similar to the English proposal.[92] With respect to the dominant land, however, it differs substantially. In this context, the Law Commission stated:[93]

> In relation to development obligations...there is no dominant land as such. The concept of the dominant land is replaced by that of 'the development land', and development obligations may be made enforceable either by owners of other parts of the development land or by a 'manager' acting on their behalf.

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[90] See, generally, English Report, *supra*, note 5, paras. 6.1-7.76, at 38-59.

[91] See *ibid.*, para. 7.6, at 44.

[92] Under the English proposals, "any unit on which [a development] obligation is imposed will be the servient land in relation to that obligation": *ibid.*, para. 6.8, at 39.

[93] *Ibid.*, para. 6.9, at 39.

We do not believe that the increased complexity associated with the introduction of the additional concept of the "development land" is necessary in Ontario. As we indicated previously,[94] the English proposals were made in the absence of condominium legislation, thereby requiring that more complex and detailed provisions be adopted in order to accommodate freehold flat and other developments. Under our recommendations, by contrast, no distinction is made between classes of land obligation.[95] The attributes of a land obligation remain the same, irrespective of whether the obligation is imposed between neighbours or under a development scheme.

A development scheme should be able to provide for different obligations to be imposed upon different units, or for some units to be free of obligations. Moreover, a development scheme should be able to provide for the following: the variation or extinguishment of the scheme itself; the variation, release, apportionment and extinguishment of any land obligation imposed under the scheme; and for any other matter desired by the parties.

While it should be possible for the several owners of units in the scheme to have mutual rights of enforcement, it should also be possible for the obligations imposed under the scheme to be enforced, for example, by a manager or a residents' association, for the benefit of all persons who own land under the scheme. Accordingly, the Commission recommends that, where a manager, residents' association, or other person performing similar functions has been created or appointed under a development scheme, that person should have the power to enforce all land obligations imposed under the scheme, unless the development scheme provides to the contrary. In such a case, that is, where a land obligation is enforceable by a manager, residents' association, or other person performing similar functions, the obligation should not be enforceable by the individual owners of the units benefited by the obligation, unless express provision to that effect is made in the development scheme. The creator of the scheme should also be bound by the scheme and have rights of enforcement under it while she owns land subject to the scheme.

It does not seem to us necessary to make specific recommendations concerning the obligations of a manager or a creator of a development scheme, as in the English proposals.[96] These matters, we believe, can be left, quite properly, to the parties themselves.

Thus far, we have discussed development schemes primarily in the context of the development of new subdivisions. However, the use of such a scheme should not be restricted to this situation. It might be used, for example, where the several owners of separate parcels of land wish to

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[94] See, for example, *supra*, this ch., sec. 3(b)(ii).

[95] See, generally, *ibid*.

[96] See, generally, English Report, *supra*, note 5, paras. 7.17-7.42, at 46-52.

impose a system of mutually enforceable land obligations upon their land as a whole. Similarly, it might be used in the leasehold context, for example, where a lessor wishes to provide for a system of obligations enforceable by the tenants among themselves. Accordingly, in addition to the ordinary case, in which a development scheme is created by a developer prior to the sale of the individual lots in a subdivision, we recommend that the several owners of separate parcels of land, as well as a lessor, should be able to create a development scheme.

Finally, we recommend that our earlier proposal, to the effect that the benefit of a land obligation should be permitted to exist either as appurtenant to land or in gross, should apply equally to land obligations imposed under a development scheme. This recommendation, for example, would enable a homeowners' or residents' association under a development scheme to enforce an obligation imposed under the scheme, notwithstanding the fact that the association did not own land benefited by the obligation.

(e) Creation and Registration of Land Obligations and Development Schemes

In this section we discuss the requisite formalities for the creation of land obligations and development schemes, the need for registration of the instruments of creation, and the effect of such registration.[97]

Development schemes and land obligations imposed outside of development schemes, should be created, in our view, only by instrument in writing, signed by the person or persons creating the development scheme or land obligation. However, there should be no requirement that they must be executed under seal.[98] In addition, the Commission recommends that, in respect of each development scheme, the instrument should state that it creates a development scheme, and it should describe the land to which it applies with the particularity required by the land registration statutes. Similarly, in respect of each land obligation, whether or not such obligation is imposed under a development scheme, the Commission recommends that the instrument should state that it creates a land obligation, and it should describe both the servient land and, where the benefit of the obligation does not exist in gross, the dominant land with the particularity required by the land registration statutes.

The Commission further recommends that, in the event that the formal requirements specified above are not satisfied, the instrument should be

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[97] See, generally, *ibid.*, note 5, paras. 8.1-9.26, at 60-73.

[98] See s. 13 of the *Land Registration Reform Act, 1984*, S.O. 1984, c. 32, which provides, in part, that a document transferring an interest in land need not be executed under seal to be effective. Section 13 appears in Part I of the Act, which, by s. 2, "applies to documents affecting or relating to land in the parts of Ontario that are designated by regulation". All of Ontario has been designated for the purpose of Part I of the Act: O. Reg. 580/84, s. 1(1), as am. by O. Reg. 35/85, s. 1(1).

deemed conclusively not to create a land obligation or a development scheme. In such a case the instrument might create a personal covenant or other obligation.

Both land obligations and development schemes, including a subsequent variation or extinguishment thereof, should be registrable[99] under the *Land Titles Act*,[100] and the *Registry Act*.[101] When a development scheme or a land obligation, or a variation or extinguishment thereof, is submitted for registration, it should be registered on the title to every parcel described in the instrument. To the extent necessary, the *Land Titles Act* and the *Registry Act* should be amended to permit such registration.[102]

Upon first registration of land under the *Land Titles Act*,[103] land burdened or benefited by a land obligation should be registered as subject to, or as having the benefit of, the obligation. Moreover, in our view, a land obligation should be registered in order to bind subsequent transferees. Accordingly, we have concluded that a land obligation should not take effect as an overriding interest under section 47 of the *Land Titles Act*,[104] and we so recommend.

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[99] Variation and extinguishment of land obligations and development schemes are discussed *infra*, this ch., sec. 3(l).

Section 3(1) of the *Land Registration Reform Act, 1984*, *supra*, note 98, provides that a document shall not be registered under the *Land Titles Act*, R.S.O. 1980, c. 230, or the *Registry Act*, R.S.O. 1980, c. 445, unless it complies with Part I of the *Land Registration Reform Act, 1984*, and the regulations, or unless it is attached to a document that complies with those requirements. Thus, if a land obligation is to be imposed upon a transfer of land, compliance could be accomplished by attaching a schedule to a transfer made pursuant to the *Land Registration Reform Act, 1984* (see *Land Registration Reform Act, 1984*, *supra*, note 98, ss. 3(1) and 4, and O. Reg. 580/84, s. 2(1)). In other cases, for example, where a land obligation is to be imposed under a development scheme, compliance could be accomplished either by creating the interest directly in a "Document General" (see O. Reg. 580/84, s. 2(4) and (5)) or by attaching the creating document to a "Document General" (see O. Reg. 580/84, ss. 2(4) and 4).

[100] *Supra*, note 99.

[101] *Supra*, note 99.

[102] While amendment might be necessary in connection with the *Land Titles Act*, *supra*, note 99, it is likely that ss. 1(f) and 21 of the *Registry Act*, *supra*, note 99, are sufficiently broad, at present, to permit the registration of land obligations and development schemes. Moreover, s. 20(2) of the *Registry Act* provides as follows:

> 20.—(2) Subject to subsection (3), the land registrar shall enter every instrument that mentions [each] parcel or lot of land in the abstract index in the prescribed manner under the proper heading of each separate parcel or lot of land.

[103] *Supra*, note 99.

[104] Section 47 of the *Land Titles Act*, *ibid*., provides that, unless the contrary is expressed on the register, all registered land is subject to certain unregistered liabilities, rights, and interests.

Section 81(5) of the *Land Titles Act*[105] provides as follows:

> 81.—(5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, notwithstanding any express, implied or constructive notice, are entitled to priority according to the time of registration.

The effect of this provision would appear to be that if a land obligation is registered, a subsequent transferee will take subject to it, whereas, if a land obligation is not registered, a subsequent transferee will not take subject to it, even if the transferee had express, implied or constructive notice. However, section 81(5) has been interpreted restrictively. It has been held to apply only to instruments affecting the same estate or interest in land.[106] Where different estates are affected, for example, where one instrument relates to the fee simple and another relates to a leasehold, the section has been held to have no application.[107] As a result, the doctrine of notice has been reintroduced into the Act. In order to prevent such a result in respect of land obligations, the Commission recommends that section 81(5) of the *Land Titles Act*[108] should be amended to ensure that, in all cases, land obligations are entitled to priority according to the time of their registration.

By virtue of sections 47(1)4 and 81(5) of the *Land Titles Act*,[109] a prior unregistered lease or agreement for lease for a period yet to run not exceeding three years, where there is actual occupation under it, would appear to have priority over a subsequent registered land obligation. Such a lease is protected notwithstanding the absence of registration. Where the land obligation is registered first, however, it would appear to have priority over a subsequent unregistered short-term lease. Unfortunately, the language of these sections is not entirely clear, nor is their operation free from doubt.[110] We have concluded, therefore, that, in order to avoid any uncer-

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[105] *Ibid.*

[106] *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915, (1976), 71 D.L.R. (3d) 72.

[107] *Ibid.*

[108] *Supra*, note 99.

[109] Section 47(1)4 provides as follows:

> 47.—(1) All registered land, unless the contrary is expressed on the register, is subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed to be encumbrances within the meaning of this Act:
>
> ....
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> 4. Any lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it.

Section 81(5) is reproduced *supra*, text accompanying note 105.

[110] See, for example, the discussion of s. 81(5), *supra*, this sec.

tainty, and to ensure that a subsequent short-term lessee will be bound by a prior registered land obligation,[111] the *Land Titles Act* should be amended to provide expressly that a prior registered land obligation has priority over a subsequent unregistered lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it.

The question of priorities is resolved somewhat differently under the *Registry Act*.[112] Section 65(1) of that Act provides as follows:

> 65.—(1) After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless the instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

This section deals with the issue of priorities "as between a prior unregistered instrument and a subsequent registered instrument".[113] It protects "a person claiming under an instrument executed subsequently to but registered before another instrument which deals with the same lands".[114] A person claiming the protection of section 65(1), however, must take for valuable consideration, and must be without actual notice of the prior instrument.

By operation of this section, a subsequent purchaser for valuable consideration, with actual notice of a prior unregistered land obligation, would take subject to the prior unregistered interest. We have concluded that, with respect to land obligations, this result is not appropriate. In our view, anyone dealing subsequently with the land should be able to rely solely on the public record to disclose all land obligations affecting title. Accordingly, the Commission recommends that the *Registry Act* should be amended to provide that the doctrine of actual notice, contained in section 65(1), does not apply to land obligations.

Like the *Land Titles Act*, the *Registry Act* also exempts certain short-term leases from the need for registration. Section 65(2) of the latter Act provides:

> 65.—(2) This section does not extend to a lease for a term not exceeding seven years where the actual possession goes along with the lease, but it does extend to every lease for a longer term than seven years.

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[111] Later in this chapter we recommend that the holders of certain insubstantial interests, including leases for a term of 21 years or less, should be bound only by restrictive and access obligations. See *infra*, this ch., sec. 3(g).

[112] *Supra*, note 99.

[113] Rayner and McLaren (eds.), *Falconbridge on Mortgages* (4th ed., 1977), §8.2, at 132.

[114] *Ibid.*, §8.2, at 137.

In the absence of this exception, a prior unregistered lease, of the type described in the section, would be adjudged fraudulent and void against a subsequent registered instrument, provided the subsequent purchaser or mortgagee took for value and without notice of the prior lease. The rationale and operation of this provision has been described in the following terms:[115]

> If a lease is for a term not exceeding seven years and the actual possession goes along with the lease, a subsequent purchaser or mortgagee is put upon enquiry by the possession of the tenant and is thus affected with constructive notice of such tenant's rights. If the lease is for more than seven years, or if the possession does not go along with the lease, and if the lease is not registered, a person claiming under a subsequent registered instrument without actual notice of the lease, takes free from it, and the doctrine of constructive notice is excluded.

It would appear, therefore, that, by virtue of section 65(1) and (2) of the *Registry Act*, a prior unregistered lease, for a term not exceeding seven years where actual possession goes along with the lease, would have priority over a subsequent registered land obligation. This is unobjectionable since, as noted above, "a subsequent purchaser or mortgagee is put upon enquiry by the possession of the tenant and is thus affected with constructive notice of such tenant's rights".[116]

By its own terms, however, section 65 would not apply to resolve the priority dispute between a prior registered land obligation and a subsequent unregistered short-term lease. No special provision is made for short-term leases in these circumstances and, presumably, the issue would be determined by the ordinary principle of priority of registration.[117] The operation of these priority sections, however, is not altogether clear. The Commission has concluded that, in order to avoid any uncertainty, and to ensure that a subsequent short-term lessee will be bound by a prior registered land obligation,[118] the *Registry Act* should be amended to provide expressly that a prior registered land obligation has priority over a subsequent unregistered lease for a term not exceeding seven years where the actual possession goes along with the lease.

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[115] *Ibid.*, §8.3, at 140.

[116] *Ibid.*

[117] Section 66 of the *Registry Act*, *supra*, note 99, provides as follows:

> 66. Priority of registration prevails unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration.

See, also, s. 69(1) which provides that "registration of an instrument under this... Act constitutes notice of the instrument to all persons claiming any interest in the land, subsequent to such registration".

[118] See *supra*, note 111.

Finally, we note that it is possible that the rule against perpetuities, as amended by the *Perpetuities Act*,[119] would apply to contingent land obligations.[120] The rule strikes down interests that do not vest within a specified time period. Thus, for example, an obligation to repair any building erected or to be erected on land, or to replace a boundary wall in the future, might offend against the rule. This, we have concluded, is inappropriate. The rule was developed originally in order to prevent an individual from tying up her land for an indefinite period of time after death. Clearly, the same policy considerations do not apply with respect to land obligations. Accordingly, the Commission recommends that the rule against perpetuities, as amended by the *Perpetuities Act*, should not apply to land obligations.

(f) The Benefit of Land Obligations

It has been recommended above that the benefit of a land obligation may, but need not, run with benefited land.[121] That is, it may exist either as appurtenant to land or in gross. It has also been recommended above that, if the benefit of a land obligation is appurtenant, it is appurtenant to and runs with the land, and not with an estate therein.[122] We now turn to consider who may enforce the land obligation.[123]

The Commission recommends that where the benefit of a land obligation exists as appurtenant to land, the owner or occupier, from time to time, of all or part of the dominant land should be able to enforce the obligation.[124] This, of course, is the essence of an appurtenant interest. Where the benefit of a land obligation exists in gross, the owner of the benefit, from time to time, should be able to enforce the obligation. In this case, however, a subsequent owner should be able to enforce the obligation only if the benefit is assignable, and if it is in fact assigned.

Once the owner of the dominant land has ceased to hold any interest in that land, or, once the owner of a land obligation in gross has assigned the benefit of the obligation, as the case may be, the Commission recommends that, unless the parties have agreed expressly to the contrary, the owner should no longer be able to enforce the obligation. There can be no objection

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[119] R.S.O. 1980, c. 374.

[120] See English Report, *supra*, note 5, paras. 8.31-8.34, at 65-66.

[121] See *supra*, this ch., sec. 3(b)(iv).

[122] See *supra*, this ch., sec. 3(b)(iii).

[123] See English Report, *supra*, note 5, paras. 10.1-10.14, at 74-77.

[124] The possibility that the owner of a part of the dominant land that does not benefit from a particular land obligation will seek to enforce the obligation is addressed by the recommendation, made below, that no one should be entitled to a remedy in respect of a contravention unless the person has been materially prejudiced by the breach. See *infra*, this ch., sec. 3(i).

to the owner retaining a separate right of enforcement, in these circumstances, pursuant to the terms of an express agreement to that effect. In such a case, however, the obligation would be enforceable as a personal covenant only, not as a land obligation.

The Commission further recommends that an adverse possessor of the dominant land should be able to enforce a land obligation, whether or not she has acquired an indefeasible title.

Finally, it should be noted that recommendations respecting enforcement have already been made above, in the context of development schemes. For example, the Commission recommended earlier that a manager or a residents' association, to whom the several owners of units in the scheme have delegated their rights of enforcement, should have a right of enforcement for the benefit of all persons who own land under the scheme.[125] The Commission also recommended that the creator of a development scheme should have rights of enforcement under it while she owns land subject to the scheme.[126]

(g) The Burden of Land Obligations[127]

As is apparent from the foregoing, the burden of a land obligation cannot run unless there is servient land to which the obligation is appurtenant. It has also been stated that, while the burden should be appurtenant to the servient land, and not to an estate therein,[128] it would be improper to impose the burden of some land obligations on all persons who may have an interest, from time to time, in the servient land. In particular, this would be unfair to persons having only a limited interest in the servient land.

In order to avoid such a result, it is necessary to distinguish between those land obligations that should bind everyone who might be in occupation of the servient land, and those land obligations that should not bind individuals with limited interests in the servient land. In our view, for the reasons set out below, this distinction is most appropriately made between restrictive and access obligations, on the one hand, and other land obligations, on the other hand. First, compliance with land obligations in the former category would be less onerous than compliance with obligations in the latter category. Neither a restrictive obligation nor an access obligation requires that any positive action be taken. By contrast, the other types of land obligation all require either that some positive action be taken or that a payment be made. Secondly, whereas a restrictive or access obligation is complied with only so long as everyone complies, other land obligations are

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[125] *Supra*, this ch., sec. 3(d).

[126] *Ibid.*

[127] See English Report, *supra*, note 5, paras. 11.1-11.34, at 78-85.

[128] See *supra*, this ch., sec. 3(b)(iii).

complied with if any one person takes the required action or makes the required payment. These distinctions reinforce our conclusion that a broader category of individuals ought to be bound by restrictive and access obligations than by other obligations.

Subject to what is said below, we have concluded, therefore, that restrictive and access obligations should be binding upon everyone who, for the time being, has an estate or interest in, or who, for the time being, is in occupation of, the servient land or any part thereof. However, for the reasons set out above, we have further concluded that this rule should not apply to other land obligations. Subject to certain qualifications, discussed below, other land obligations, in our view, should be binding only upon the following persons, so long as they hold their interest in the servient land, or any part thereof: (1) persons who have a subsequent freehold interest and who have a right of possession; (2) persons who hold an interest in a subsequent lease that is for a term exceeding twenty-one years and who have a right of possession; (3) subsequent mortgagees and other encumbrancers; (4) the person who created the land obligation, and his successors in title; and (5) adverse possessors, whether or not they have acquired an indefeasible title.

We need elaborate only briefly with respect to the above categories, to underscore the fact that, in each case, the individuals described have a sufficiently substantial interest in the servient land that it would not be inequitable for them to be bound by the obligation. The first category would include not only those persons who have an interest in fee simple, but also those who have a life estate in the servient land. In both cases, they also must have a right of possession. Thus, a person holding either a remainder interest or a reversionary interest would be excluded. Similarly the second category would include a long term lessee with a right of possession. The third category would include mortgagees and other encumbrancers of the servient land, although we recommend below that such mortgagees should be liable for a contravention of a land obligation only in limited circumstances.[129] The fourth category would include, for example, a lessee under a fifteen year lease, as well as her successors or assigns, where the lessee entered into the land obligation. Clearly, not only the person who creates a land obligation in respect of the servient land, but also her successors, should be bound by the obligation whether the maker owns the fee simple or a lesser interest in the servient land. Finally, since land obligations are to run with the land itself, an adverse possessor of all or part of the servient land, whether or not he has acquired an indefeasible title, should be subject to the burden of a land obligation. This is the corollary to our earlier recommendation that an adverse possessor of the dominant land should be able to enforce a land obligation.[130]

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[129] See *infra*, this ch., sec. 3(h).

[130] See *supra*, this ch., sec. 3(f).

As indicated earlier, the above recommendations concerning the running of the burden of a land obligation should be subject to certain qualifications. In accordance with the general rules of priority, no one should be bound by a land obligation if she has priority over it by virtue of a prior registered interest, or if she acquired a derivative interest from, or occupies under, such a person.

Although a prior unregistered short-term lease would have priority over a subsequent registered land obligation,[131] it would not have priority "by virtue of a prior registered interest". Accordingly, to ensure that such a lease would not be bound by a subsequent registered land obligation, the Commission recommends that a lease referred to in section 65(2) of the *Registry Act*[132] or section 47(1)4 of the *Land Titles Act*,[133] as the case may be, should not be bound by a subsequent land obligation.

It should be possible for the owner of the dominant land, or the owner of the benefit of a land obligation in gross, to postpone his priority in favour of a subsequent encumbrancer of the servient land, and we so recommend. By permitting a subsequent encumbrancer to take free of a prior land obligation in this way, future financing might be facilitated.

The Commission further recommends that the parties to a land obligation should be able to restrict the class of persons who should be bound by it.

Finally, unless a contrary intention appears expressly in the creating instrument, the Commission recommends that, as in the case of easements, the original maker of the land obligation should be discharged of the burden once she has parted with all interest in the land. Since she would no longer be in possession of the servient land, and would no longer have any rights or control over it, she would be unable to ensure compliance. However, by agreeing expressly to the contrary in the creating instrument, the original maker could, in effect, guarantee performance even after she has parted with the servient land. This might be used, for example, where the maker is to guarantee payment of a reciprocal payment obligation.

(h) Liability for Contraventions of Land Obligations[134]

It is quite possible that several persons might be bound simultaneously by a positive, reciprocal payment, or positive user obligation.[135] Since all such obligations require that specific action be taken, failure on the part of each person bound by the obligation to take such action amounts to a contravention. Thus, although compliance with such an obligation would

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[131] See *supra*, this ch., sec. 3(e).

[132] *Supra*, note 99. Section 65(2) is reproduced *supra*, this ch., sec. 3(e).

[133] *Supra*, note 99. Section 47(1)4 is reproduced *supra*, note 109.

[134] See English Report, *supra*, note 5, paras. 12.1-12.14, at 86-89.

[135] See the recommendations made *supra*, this ch., sec. 3(g).

require performance by only one of the persons bound, all of the persons bound will have breached the obligation if they all have failed to take the required action. In these circumstances, in our view, they should all be held liable. Accordingly, the Commission recommends that all persons bound by positive obligations, reciprocal payment obligations and positive user obligations should be liable for a contravention.[136]

Persons bound by restrictive and access obligations, on the other hand, are required to refrain from taking specified action. Restrictive and access obligations are breached, therefore, when some prohibited conduct is performed by an individual in contravention of the obligation. In these circumstances it would be inequitable, in our view, to impose liability upon everyone bound by the obligation. The Commission recommends, therefore, that only the person bound by a restrictive or access obligation who actually committed the breach should be liable. However, where such a person has not breached the obligation personally, but rather has permitted or suffered a breach to be committed by another person, the person bound by the obligation who permitted or suffered the breach should be held liable.[137]

Where a person bound by a land obligation is a subsequent mortgagee, chargee, or holder of other security, additional considerations arise. Ordinarily, such security holders have no right to possession of the land and, therefore, are unable to ensure compliance with the land obligation. Once they have taken possession of the servient land, however, they would have sufficient control, in our view, to warrant their liability. Accordingly, the Commission recommends that subsequent mortgagees, chargees, and holders of other security should be liable for breach of a land obligation only if they were in possession of the servient land at the time of the breach.

The reference to the "time of the breach" raises a further issue. Our recommendations ensure that a person would be held liable in respect of a contravention only if, at the time of the breach, the person was bound by the obligation. Thus, for example, an owner of the servient land would not be liable for a contravention that occurred prior to her acquisition of the servient land. However, certain breaches of land obligations are of a continuing nature. For example, where an obligation requires that the servient land must be used in a particular manner, the obligation would be breached not only when an unauthorized use commences; it would also be breached continuously while the unauthorized use persists. In such a case, the Commission recommends that the person or persons who caused the breach, as well as his or their successors, should remain and be liable so long as the breach continues.

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[136] We discuss below the right of contribution in such circumstances. See *infra*, this sec.

[137] It should be noted that, as we recommend below, the parties should be free to vary these rules. See *infra*, this sec.

We have further concluded that the parties should be able to vary the above rules, either in the original instrument creating the interest or in a subsequent instrument, for the purpose of restricting the circumstances in which a person may be held liable for the contravention of a land obligation, and we so recommend. In either case the instrument may be registered on the title to the land affected and, when registered, will be a matter of public record.

Earlier in this section, we indicated that several persons might be bound simultaneously by a positive, reciprocal payment, or positive user obligation. This might arise, for example, where the servient land is divided into separate parcels, and each parcel passes into separate ownership. Where all persons bound by such an obligation fail to take the required action, the Commission recommended that all such persons should be liable for the contravention. In such a case, while the dominant owner may enforce the obligation against anyone liable for the contravention,[138] the servient owners, among themselves, should have a right of contribution.[139]

In our 1988 *Report on Contribution Among Wrongdoers and Contributory Negligence*,[140] contribution and certain related claims were described in the following terms:[141]

> [T]hey enable a person (D1), who is subject to a common legal demand with another (D2) to a third person (P), to recover from D2 the whole or part of a payment made by D1 to P that discharges all or part of the liability of D2 to P. In the case of contribution, D1 is entitled to recover from D2 the amount that D1 paid to P that, as between D1 and D2, exceeded the proportionate share of D1's liability.

We noted that the basis of virtually all contribution claims is the restitutionary principle of unjust enrichment.[142] However, we also noted that the relatively complex common law and equitable rules "depend to some extent on the particular nature of the relationship between D1 and D2".[143] Thus, for example, "[s]ubject to any contractual provision to the contrary, rights of contribution have been granted by the courts between

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[138] The dominant owner may do so, unless the parties have varied the land obligation to provide for the apportionment of the liability of the servient owners. The variation of land obligations is discussed *infra*, this ch., sec. 3(l)(iii).

[139] As we discuss *infra*, this ch., sec. 3(l)(iii), the servient owners may agree among themselves to apportion liability.

[140] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) (hereinafter referred to as "Contribution Report").

[141] *Ibid.*, at 49-50.

[142] *Ibid.*, at 50.

[143] *Ibid.*

sureties, joint contractors, trustees, company directors, partners, co-insurers, mortgagors, and joint tenants, where one of the parties has paid more than her proportionate share of the common obligation".[144]

In addition to rights of contribution arising at common law, in equity, or by contract, such rights may arise by statute. However, unlike the *Civil Liability (Contribution) Act 1978* in the United Kingdom, which provides for a statutory right of contribution among concurrent wrongdoers irrespective of the legal nature of their liability,[145] section 2 of the Ontario *Negligence Act* provides for contribution among tortfeasors only.[146] Of course, as we pointed out in our Contribution Report, "[t]he inapplicability of the *Negligence Act* to non-tortious wrongdoers...does not necessarily exhaust the possibilities for apportioning a single loss among those concurrently liable for it".[147] The courts may find an express or implied contractual right to contribution between D1 and D2, or they may resort to the equitable doctrine of contribution mentioned above. Notwithstanding these possible alternatives, however, the Commission arrived at the following conclusion:[148]

> [S]tatutory reform is both desirable and necessary. Even if there already exists a right to contribution among concurrent wrongdoers who are not tortfeasors, the state of doctrinal development is, at best, uncertain. The virtual absence of any cases in which a court has applied general restitutionary principles to give relief is likely to mean that the law in this rather difficult and technical area will evolve slowly and piecemeal.

Thus, whether or not the courts would recognize a right of contribution among servient owners by virtue of the equitable doctrine, as we indicated in our Contribution Report, "the uncertainties in the present law, the practical importance of clarity in this area, the difficulties experienced by the courts in assembling a coherent set of legal rules on a case-by-case basis from the somewhat abstract restitutionary principle of unjust enrichment, and the likelihood that discrepancies will emerge...make a legislative solution attractive in Ontario".[149] Therefore, in accordance with our earlier

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[144] *Ibid.*

[145] Section 1(1) of the *Civil Liability (Contribution) Act 1978*, c. 47 (U.K.) provides as follows:

> 1.—(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly liable with him or otherwise).

[146] Section 2 of the *Negligence Act*, R.S.O. 1980, c. 315 provides for a right of contribution "[w]here damages have been caused or contributed to by the fault or neglect of two or more persons". The interpretation of s. 2 is discussed in our Contribution Report, *supra*, note 140, at 59 *et seq.*

[147] *Ibid.*, at 68.

[148] *Ibid.*, at 73.

[149] *Ibid.*, at 74.

recommendation that there should be a right of contribution among all concurrent wrongdoers, whatever the legal nature of their liability,[150] the Commission recommends that a right of contribution should exist among all persons who are liable for breach of a positive obligation, reciprocal payment obligation, or positive user obligation.[151]

(i) Remedies for Contraventions[152]

Earlier we noted that, while the burden of restrictive covenants may run with freehold land at present, they do so only in equity.[153] As a consequence, only equitable remedies are available in the event of a contravention. Conveniently, however, injunctive relief is often the most appropriate remedy for breach of a restrictive obligation. Positive obligations, by contrast, are enforced most appropriately by legal remedies, particularly damages. Since land obligations comprise both positive and restrictive, as well as other, obligations, it is essential that the range of available remedies be expanded to ensure that all types of land obligation can be enforced in the manner most appropriate to the circumstances. Accordingly, the Commission recommends that the following remedies should be available upon a contravention of a land obligation:

(1) an injunction (including a mandatory injunction) or other equitable relief;

(2) damages for moneys due under a land obligation; and

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[150] *Ibid.*, at 73. See, also, s. 3(1) of the proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), annexed to the Contribution Report, which provides as follows:

> 3.—(1) Sections 4 to 19 [which include a right to contribution among concurrent wrongdoers] apply where liability for damages or to deliver goods or perform services arises from,
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> (a) a tort;
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> (b) a breach of statutory duty;
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> (c) a breach of contract;
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> (d) a breach of a fiduciary duty, including a breach of trust, except as otherwise specifically provided by the *Trustee Act*; or
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> (e) a breach of any other legal duty.

[151] Section 3(1) of the Draft Act, reproduced *ibid.*, would not extend a right of contribution to those liable for a debt. See Contribution Report, *supra*, note 140, at 74. Accordingly, it would appear that the proposed statutory provision would not apply in the event of a breach of a reciprocal payment obligation. However, as we noted in the Contribution Report (at 74), "there appears to be no significant dissatisfaction with the present law respecting the existing rights to contribution among those who owe debts to another".

[152] See English Report, *supra*, note 5, paras. 13.1-13.46, at 90-99.

[153] See *supra*, this ch., sec. 3(a).

(3) damages, both for pecuniary and non-pecuniary kinds of loss.

Moreover, the Commission recommends that an injunction should be available upon a threatened contravention of a land obligation.

A right of re-entry upon the servient land should not be permitted. Not only are the preceeding remedies adequate, in our opinion, but a right of re-entry has the potential of being oppressive of the owner of the servient land.

We now turn to consider whether the parties to a land obligation should be able to exclude or restrict a person's liability for breach, either in whole or in part. In our view, the parties should be free to exclude one or more types of liability completely, for instance, liability for damages. Similarly, the parties should be free to restrict one or more types of liability, for example, liability for damages under a particular head, or liability for damages in excess of an agreed amount. The Commission recommends, therefore, that the parties to a land obligation should be free to provide, either in the original instrument creating the interest or in a subsequent instrument, that, on breach of a land obligation, one or more types of liability shall be excluded, either in whole or in part. The instrument may be registered on the title to the land affected, and may thus be made a matter of public record. We emphasize, however, that the power to modify the remedies otherwise available extends only to the remedies set out above. It is not intended that the parties should have a general power to "contract out" of the proposed scheme. For example, the right of re-entry has been precluded expressly, and the parties should not be able to provide by contract for such a right.

The Commission further recommends that a person should be entitled to a remedy in respect of a contravention only to the extent to which he is materially prejudiced by the breach, in the capacity in which he is entitled to enforce the obligation. Thus, for example, where a land obligation technically benefits dominant land, but, due to the distance from the servient land, the owner of the dominant land suffers no real damage as a result of a breach, she should be refused a remedy.

We recommended above that, in addition to certain other remedies, an action for damages should be available in the event of a contravention of a land obligation. At present, of course, in most circumstances, only equitable remedies are available for breach of restrictive covenants.[154] Although we have recommended that damages should be available for a breach of all types of land obligation, we have concluded that it would be oppressive to make common law damages available against certain persons with insubstantial interests for breach of a restrictive or access obligation.[155] In this

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[154] See *supra*, ch. 2, sec. 5(d). Restrictive covenants are also enforceable at law, in limited circumstances. See *supra*, note 37.

[155] Earlier we recommended that, while restrictive and access obligations should be binding upon certain persons with insubstantial interests, such persons should not be bound by other land obligations. See *supra*, this ch., sec. 3(g).

respect, the English Commission recommended that such damages should be available only against certain persons, including owners of an estate or interest in the servient land that is the burdened estate.[156] The substance of this limitation, in our view, is entirely appropriate, although it is necessary to account for certain differences between the recommendations made in this Report and the recommendations made in the English Report.

It will be recalled that, earlier in this chapter,[157] the Commission recommended that the burden of a land obligation should be appurtenant to the servient land, and not to an estate therein. Accordingly, the notion of the "burdened estate", contained in the English proposals, has no analogue in our recommendations. It is possible, however, to achieve a similar result by referring instead to the person who entered into the obligation and her successors in title. The Commission recommends, therefore, that common law damages should be available only against the following: (1) the person who entered into the obligation and her successors in titl , (2) a mortgagee; and (3) a person who has a right to possession and has either a freehold interest or a leasehold interest for a term exceeding twenty-one years.

Our earlier recommendation with respect to the availability of damages refers to "damages, both for pecuniary and non-pecuniary kinds of loss".[158] Thus, where a contravention of a land obligation results in personal injury, both pecuniary and non-pecuniary damages would be recoverable. Where a person suffers loss or damage due, in part, to her own fault or neglect, and due, in part, to a breach of a land obligation, we have concluded that the principle of contributory negligence[159] should apply. Accordingly, the Commission recommends that, in any action for damages for breach of a land obligation, the right to damages should be subject to any apportionment of damages due to the contributory fault or neglect of the person enforcing the obligation.

(j) Limitation of Actions

The Commission recommends that the limitation period applicable to actions in respect of land obligations should be the same as for other actions in respect of land, that is, a period of ten years.[160] While some land obligations take the form of money payments and could be compared,

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[156] English Report, *supra*, note 5, para. 13.26, at 95.

[157] See *supra*, this ch., sec. 3(b)(iii).

[158] *Supra*, this sec.

[159] The principle of contributory negligence is embodied in the *Negligence Act*, *supra*, note 146, s. 4, and the *Family Law Act, 1986*, S.O. 1986, c. 4, s. 61(3).

[160] *Limitations Act*, R.S.O. 1980, c. 240, s. 4. See, also, the discussion *supra*, ch. 2, sec. 5(i). The English Commission recommended that the limitation period in respect of land obligations should be the same as for actions in tort, actions in contract and actions for sums recoverable by statute. See English Report, *supra*, note 5, para. 13.34, at 96.

therefore, to debts or contractual obligations for which a shorter period might be more appropriate, in our view land obligations are so closely connected with the land that the ten year period applicable to land should apply as well to land obligations. Moreover, breach of a land obligation differs from the non-payment of a debt to the extent that the breach might not come to the attention of the person entitled to enforce the obligation for some time after the contravention.

As we indicated in our 1969 *Report on Limitation of Actions*,[161] the relationship of the *Limitations Act* to claims for equitable remedies is somewhat obscure. However, we noted that the Act is applicable to equitable claims by way of analogy where the equitable right claimed corresponds to a legal right, or where the equitable remedy claimed is in aid of a legal right.[162] Thus, for example, the Act would be applied by way of analogy where proceedings are brought for specific performance, rescission, or an injunction. We have concluded that the statutory ten year limitation period should apply expressly with respect to all remedies for breach of a land obligation, including equitable remedies, and we so recommend.

The central principle of limitations legislation is "that no proceedings may be brought after a particular period of time has elapsed from the moment at which the cause of action arose".[163] Since a contravention of a land obligation should be actionable from the moment the contravention occurs, the cause of action should be said to arise at that time, and we so recommend. The desirability of adopting the contract analogy in this context was discussed by the English Commission in the following terms:[164]

> [A] cause of action for breach of contract arises at the moment of the breach and does not depend upon damage. In this respect a contravention of the kind with which we are concerned [that is, a contravention of a land obligation] must clearly follow the contract analogy. Any other conclusion would mean that those who were entitled to enforce an obligation would have to sit back and wait because, although there had been a contravention, it had not yet given rise to actual damage.

Accordingly, subject to the ordinary statutory rules providing for the postponement, suspension, or extension of the limitation period in certain circumstances—for instance, where the person entitled to bring an action is under a disability, or where there is a concealed fraud[165]—the Commission

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[161] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) (hereinafter referred to as "Limitations Report"), at 18-19.

[162] *Ibid.*

[163] *Ibid.*, at 91. This assumes, of course, that no statutory provision specifies that time shall begin to run from the occurrence of some other event.

[164] English Report, *supra*, note 5, para. 13.37, at 97.

[165] *Limitations Act*, *supra*, note 160, ss. 28 and 36-39. See, also, the discussion in our Limitations Report, *supra*, note 161, at 93 *et seq*.

recommends that the limitation period in respect of a cause of action for contravention of a land obligation should begin to run when the cause of action arises, that is, when the contravention occurs.

As between the original parties to a land obligation, a contravention would ordinarily constitute not only a breach of the land obligation, but also a breach of contract. As we noted above, a cause of action for breach of contract would arise at the time of the breach. Thus, in these circumstances, whether the action is framed as being for breach of contract, or for contravention of a land obligation, the cause of action would arise, and the limitation period would begin to run, at the time of the contravention. It is also possible, however, that the defendant's conduct would amount to a breach of duty in tort. A cause of action for negligence would not arise until damage has occurred, or, perhaps, until the damage, or other material facts, have been discovered or ought to have been discovered by the exercise of reasonable diligence.[166] Thus, the running of the limitation period might be postponed if the plaintiff were able to frame the action in tort.[167] The question arises, therefore, whether concurrent liability can exist in tort for

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[166] Traditionally, a cause of action for negligence was said to arise upon the occurrence of damage. This has been altered substantially by the adoption of the "discoverability of damage" doctrine by the Supreme Court of Canada in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 (subsequent references are to 31 D.L.R. (4th)). In that case it was held, at 535, as follows:

> [A] cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. . . .

As to the possibility that, notwithstanding this decision, future cases might continue to hold that a cause of action in negligence arises upon the occurrence of damage, see Irvine, *Annotation* (1986), 37 C.C.L.T. 119, at 121.

[167] The argument might be made that the "discoverability of damage" doctrine applies equally to an action for breach of contract. See Blom, "Concurrent Liability in Tort and Contract—Start of Limitation Period: Central Trust Co. v. Rafuse" (1987), 21 U.B.C.L. Rev. 429, at 447-48. See, also, *Consumers Glass Co. Ltd. v. Foundation Co. of Can. Ltd.* (1985), 51 O.R. (2d) 385, at 398, 20 D.L.R. (4th) 126 (C.A.), where Dubin J.A., speaking for the Court, said:

> [I]n cases which are based on a breach of duty to take care, a cause of action does not arise, and time does not begin to run for the purposes of the *Limitations Act*, until such time as the plaintiff discovers or ought reasonably to have discovered the facts with respect to which the remedy is being sought, whether the issue arises in contract or in tort.
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> As I read the judgment of the Supreme Court of Canada in *Kamloops*, *supra*, the underlying policy consideration was 'the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence'. That principle, in my opinion, is equally applicable where the issue arises in cases sounding in contract or in tort.

an act or omission that constitutes a breach of contract or a contravention of a land obligation.[168]

The doctrine of concurrent liability, which would permit a plaintiff to sue either in tort or in contract, received explicit approval in the Supreme Court of Canada in *Central Trust Co. v. Rafuse*.[169] Although the specific question concerned the nature of a solicitor's liability for professional services, the reasoning and the conclusions drawn in that case would appear to have broader application. Le Dain J., speaking for the Court, held that a common law duty of care is created by a relationship of sufficient proximity, and is not restricted to relationships that arise apart from contract.[170] The important question "is whether there is a relationship of sufficient proximity, not how it arose".[171] The relationship between the two concurrent causes of action was described by Mr. Justice Le Dain in the following terms:[172]

> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. . . .A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort.

Reference should also be made to s. 10(1) of *An Act to revise the Limitations Act*, Bill 160 (3rd Sess., 32nd Leg.), 1st Reading, December 16, 1983, which provided, in part, as follows:

> 10.—(1) In an action,
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> . . . .
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> (c) for economic loss arising from breach of a duty of care, whether the duty arises in tort or contract or by statute;
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> . . . .
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> the limitation period fixed by this Act does not begin to run against a person until he knows or, in all the circumstances of the case, he ought to know the identity of the defendant and sufficient facts to indicate that he has a cause of action.

168 It is unnecessary to consider, for the purpose of the limitation period, whether there can be concurrent liability for an act or omission that constitutes both a breach of contract and a contravention of a land obligation. In both cases the cause of action will arise, and the limitation period would begin to run, from the time of the contravention.

169 *Supra*, note 166.

170 *Ibid.*, at 521.

171 *Ibid.*

172 *Ibid.*, at 521-22.

Finally, Le Dain J. concluded that, with one qualification, "where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence".[173]

Thus, where the contravention of a land obligation constitutes both a breach of contract and a breach of a common law duty of care, the decision in *Central Trust Co. v. Rafuse* would suggest that the plaintiff has the right to frame the action either in contract or in tort, at his option. Where the contravention of a land obligation does not constitute a breach of contract, although the decision in *Central Trust Co. v. Rafuse* might not be applicable directly, the reasoning in that case would appear to be applicable by analogy. In these circumstances, therefore, where a contravention of a land obligation constitutes a breach of common law duty of care, the plaintiff would appear to have the right to frame the action in the manner that appears to him to be most advantageous.

In some cases, the contravention of a land obligation is of a continuing nature. In these circumstances we recommend that time should not start to run until the contravention has ceased.

(k) Determining the Identity of Persons Liable

The English Law Commission recommended the establishment of a notice procedure to enable the owner of a land obligation to discover the identity of the person or persons liable in respect of a contravention.[174] We agree with the English Commission that such a procedure would be useful. While the parties are able to include supplementary provisions in the instrument creating a land obligation to provide for the giving of information and the production of documents,[175] where the parties have not done so there should be some alternate method by which the person entitled to enforce the obligation can obtain the information necessary to permit its enforcement. The Commission therefore recommends that any person entitled to enforce a land obligation should be permitted to serve a notice upon anyone in occupation of the whole or any part of the servient land, or upon anyone who has, or who appears to have, an interest in the whole or any part of the servient land. The person served with the notice should be required to respond, in writing, within one month of the date of service, and should be required to include in her response the nature of any estate or interest she might have in the whole or any part of the servient land, as well as the name and address of any other person she knows or believes to have

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[173] *Ibid.*, at 522. The qualification was that "[a] concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort": *ibid.*

[174] English Report, *supra*, note 5, paras. 13.39-13.44, at 97-99.

[175] The types of supplementary provision that may be included in the instrument creating a land obligation are discussed *supra*, this ch., sec. 3(c).

an estate or interest in the whole or any part of the servient land. As the English Commission concluded, "an intending enforcer will be able by this means to build up a full picture of the ownership of the servient land, and to discover who is liable for a particular contravention".[176]

(l) Extinguishment and Variation

In this section, we discuss several methods by which land obligations may be extinguished or varied after their creation. It should be noted, however, that these are not the only methods available. For example, as the English Report suggests, "the general status conferred on land obligations—that of interests in land—will of itself ensure that they can be extinguished or varied in the same way and in the same circumstances as any other comparable interest in land".[177] Further, as we indicated in an earlier section of this chapter,[178] a development scheme may provide for the variation or extinguishment of the scheme itself, as well as for the variation, release, apportionment and extinguishment of any land obligation imposed under it.

(i) Extinguishment by Common Ownership[179]

We noted above[180] that, if the title to both the dominant land and the servient land merge in the same person, in the same right, restrictive covenants are thereby extinguished. Such covenants, moreover, are not revived upon a subsequent severance and reconveyance of one of the parcels. The English Law Commission considered this rule in the following terms:[181]

> It seems to us that once the dominant and servient lands have come into the same ownership it is unsafe to assume that the automatic revival of such obligations, on a subsequent division, would be desired or desirable. It is much more likely that the parties to that later transaction would wish to formulate their own obligations, and we have little doubt that they would in practice do so. Moreover, obvious difficulties would arise, on an automatic revival, if the subsequent division produced pieces of land whose boundaries differed from those of the original dominant and servient lands.

Like the English Commission, we are persuaded of the desirability of retaining this rule. The Commission recommends, therefore, that a land

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[176] English Report, *supra*, note 5, para. 13.42, at 98.

[177] *Ibid.*, para. 15.2, at 105.

[178] *Supra*, this ch., sec. 3(d).

[179] See English Report, *supra*, note 5, paras. 16.1-16.20, at 106-10.

[180] *Supra*, ch. 2, sec. 5(e)(i).

[181] English Report, *supra*, note 5, para. 16.6, at 107.

obligation should be extinguished if the whole of the servient land and the whole of the dominant land come into the ownership of the same person, in the same right, and if no other person is bound by, or has the benefit of, the obligation. This recommendation will ensure that a land obligation will not be extinguished so long as someone derives some advantage from its continued existence. Thus, for example, if one parcel of land is held by a person beneficially, and the other parcel of land is held by the same person as trustee, there will be no extinguishment. Similarly, there will be no extinguishment if the owners of any inferior interests in the land are either bound by, or have the right to enforce, the obligation.

Where part only of the dominant land and all or part of the servient land come into common ownership, there should be no extinguishment. The owner of the part of the dominant land that has not come into common ownership has rights respecting the entire servient land, which ought not to be defeated.

By contrast, where all of the dominant land and part only of the servient land come into common ownership, the Commission recommends that restrictive and access obligations should be extinguished to the extent that they relate to the part of the servient land that has come into common ownership. Other land obligations, however, should not be extinguished in these circumstances. As we recommended earlier,[182] while the owner of the dominant land would be entitled to seek compliance with such an obligation from any person bound by it, the servient owner who discharges the obligation should be entitled to seek contribution from the other servient owners bound by the obligation. If, contrary to our proposal, the obligation were extinguished with respect to that part of the servient land that comes into common ownership with the dominant land, a remaining servient owner who discharges the obligation would lose her right to claim contribution. Thus, she would be liable to discharge not only the portion of the obligation that relates to her own part of the servient land, but also the portion of the obligation that relates to the part of the servient land that comes into common ownership (in respect of which the obligation would be extinguished). Such a result is avoided if the obligation continues with respect to the portion of the servient land that comes into common ownership with the dominant land. That is, the servient owner who discharges the obligation would be entitled to seek contribution from the dominant owner in respect of that part of the obligation that relates to the portion of the servient land that comes into common ownership.

In the context of development schemes, additional considerations arise. We have concluded that there should be no extinguishment of any development scheme, or of any land obligation imposed under a development scheme, simply because two or more units in the scheme come into

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[182] *Supra*, this ch., sec. 3(h).

common ownership. The purpose of a development scheme is to provide for the imposition of a system of mutually enforceable obligations upon the respective parcels of land within the development area. As the English Commission concluded, "[t]here should be no...pockets of immunity within a development".[183] Accordingly, the Commission recommends that there should be no extinguishment of a development scheme, or any land obligation imposed thereunder, unless all the units comprising the scheme come into the ownership of the same person, in the same right, and no one else is bound by or has the benefit of any land obligation imposed under the scheme.

Finally, we turn to consider the situation in which a land obligation binds a lessee, but does not bind the lessor. This situation might arise, for example, where the obligation is created by the lessee for the duration of the lease. We are concerned, in this context, with the effect of an early termination of the lease on such a land obligation.

Where a lease is surrendered by the lessee to the landlord prior to the end of its term, the lease is thereby merged in the reversion.[184] Similarly, where the lessee acquires the reversion, or a third party acquires both the lease and the reversion, the lease is merged in the reversion. In both cases the lease is terminated,[185] subject to the rights of third parties, including the right to enforce a land obligation. The result of the present law, in our opinion, is salutary. Accordingly, we recommend that the obligation should continue to bind the person who owns the estate resulting from the merger of the lease and the reversion for so long as the obligation would have bound the original creator, that is, the lessee.

Where, however, the lease is forfeited by the lessor due to the fault of the lessee[186]—for example, where the lessee breaches a covenant or condition of re-entry—the result should be otherwise. The extinguishment of a tenancy upon a forfeiture generally is not subject to the rights of third parties. "Once a lessor has re-entered upon a forfeiture, the estate which he had at the time he granted the lease is revested in him."[187] In the context of land obligations, once again, in our opinion, the result of the present law is satisfactory. The Commission recommends, therefore, that where the lease is forfeited, the land obligation should terminate.

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[183] English Report, *supra*, note 5, para. 16.12, at 108.

[184] For a discussion of surrender and merger, see Bentley, McNair and Butkus (eds.), *Williams & Rhodes*[:] *Canadian Law of Landlord and Tenant* (6th ed., 1988) (hereinafter referred to as "Williams & Rhodes"), Vol. 1, §§12:2-12:5, at 12-6 *et seq.*, and Anger and Honsberger, *supra*, note 31, Vol. 1, §§811.1 and 812, at 290-91 and 294.

[185] See Williams & Rhodes, *supra*, note 184, Vol. 1, §12:1, at 12-1.

[186] For a discussion of forfeiture, see *ibid.*, §§12:6-12:10, at 12-32 *et seq.*

[187] Anger and Honsberger, *supra*, note 31, Vol. 1, §809.3, at 273.

(ii) Extinguishment by Operation of the Recording Acts

In an earlier chapter of this Report,[188] we noted that, under the *Registry Act*,[189] a land obligation would be extinguished forty years from the date of registration, although it may be renewed, from time to time, by the registration of a notice of claim.[190] The same rules would appear to apply to a development scheme registered under that Act.[191] By contrast, under the *Land Titles Act*,[192] while the obligation would similarly be extinguished forty years from the date of registration, there is no provision for renewal.[193]

There is considerable merit, in our view, in providing for the automatic extinguishment of land obligations and development schemes at the end of a period of forty years, as currently specified in the land registration statutes. As a practical matter, most land obligations will have ceased, by that time, to have any substantial utility. However, in the event that a land obligation or development scheme might still be of some benefit thereafter, we have concluded that it should be possible, from time to time, to renew a land obligation or development scheme. Since provision for renewal already exists under the *Registry Act*, the Commission recommends that the *Land Titles Act* should be amended to permit the renewal of a land obligation or development scheme registered under that Act.

(iii) Extinguishment and Variation by the Parties[194]

Land obligations, as we indicated earlier,[195] can be extinguished or varied in the same manner, and under the same circumstances, as any similar interest in land. Accordingly, where all persons bound and all persons benefited by a land obligation agree to do so in writing,[196] they may vary or extinguish the obligation and may register the variation or extinguishment on title. No specific recommendation is necessary in this regard.

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[188] *Supra*, ch. 2, sec. 5(e)(iv).

[189] *Supra*, note 99.

[190] *Ibid.*, ss. 104(1) and 106, as am. by S.O. 1981, c. 17, s. 4.

[191] *Ibid.* The definition of the term "claim" in s. 104(1)(a) would appear to be sufficiently broad to include a development scheme.

[192] *Supra*, note 99.

[193] *Ibid.*, s. 118(9).

[194] See English Report, *supra*, note 5, paras. 17.1-17.26, at 111-16.

[195] *Supra*, text accompanying note 177.

[196] Since a land obligation is an interest in land (see *supra*, this ch., sec. 3(b)(i)), an action to enforce such an agreement cannot be brought "unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized": *Statute of Frauds*, R.S.O. 1980, c. 481, s. 4.

However, where all required parties do not agree, those who do so should be able to bind not only themselves, but also their successors. For example, where there has been a division of the servient land, the owners of the separate parcels should be able to agree to apportion liability for the land obligation among themselves, and thereby bind both themselves and their successors. This latter type of variation may be contrasted with the case where all required parties agree:[197]

> Any arrangement which is made only amongst the servient owners themselves will fall short of a legal variation and will therefore not operate actually to vary the land obligation *itself*. As between them and the persons entitled to enforce it, the obligation will remain just the same and will remain enforceable in just the same way. As between themselves, however, they can make an enforceable agreement to act *as if it were* varied. Such an agreement may be described (again taking a term from the existing law) as an 'equitable' variation. Its purpose is to ensure that if the land obligation is enforced against the 'wrong' person (or against a person to a 'wrong' extent), that person can call on the other parties to the deed to reimburse him.

As this example illustrates, a partial or "equitable" variation can be effected not only among some of the dominant and servient owners together, but also among some or all of the dominant owners alone, or some or all of the servient owners alone. Of course, no recommendation is required in order to make an equitable variation binding upon the original parties to it. However, in the absence of appropriate legislation, it would not be enforceable against their successors in title. Moreover, we wish to ensure that an equitable variation of a land obligation would also bind a subsequent adverse possessor. This is consistent with our earlier recommendations that an adverse possessor should be entitled to the benefit and subject to the burden of a land obligation.[198] Accordingly, the Commission recommends that where some, but not all, of the persons bound by or entitled to enforce a land obligation agree in writing to vary the obligation, the variation should be binding not only upon the parties to it, but, provided it is registered on title, also upon their successors and subsequent adverse possessors of all or part of their land.

(iv) Extinguishment and Variation by the Court[199]

In chapter 2,[200] we discussed the present law respecting the modification and discharge of restrictive covenants under section 61 of the *Conveyancing and Law of Property Act*,[201] and section 118(5) of the *Land Titles*

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[197] English Report, *supra*, note 5, para. 17.4, at 112 (emphasis in original).

[198] *Supra*, this ch., sec. 3(f) and (g).

[199] See English Report, *supra*, note 5, paras. 18.1-18.57, at 117-27.

[200] *Supra*, ch. 2, sec. 5(e)(iii).

[201] *Supra*, note 49.

Act.[202] At a minimum, it would be necessary to extend those provisions in order to accommodate our earlier recommendation that the burden of positive land obligations should be allowed to run with land.[203] However, in our opinion, those provisions do not provide adequately at present for the modification and discharge of restrictive covenants. Accordingly, we set out below our recommendations respecting the extinguishment and variation of land obligations and development schemes by the court.

The Commission recommends that the court should have the power to extinguish or vary any land obligation (including any land obligation imposed under a development scheme) as well as any development scheme. As we have indicated,[204] at present, a purchaser under an agreement of purchase and sale does not have standing to bring an application for modification or discharge. We have concluded, however, that the right to bring such an application should not be limited to those persons who are bound by the obligation at the time of the application. The Commission recommends, therefore, that anyone interested in all or part of the servient land, including a purchaser under an agreement of purchase and sale, as well as an optionee, should have the right to apply to the court for an order extinguishing or varying a land obligation or a development scheme.

The Commission further recommends that anyone interested in servient land bound by a reciprocal payment obligation should be permitted to apply for the extinguishment or variation not only of the reciprocal payment obligation itself, but also of the services or works obligation to which it relates. In the absence of such a recommendation, although a person bound by a reciprocal payment obligation would be entitled to apply to have that obligation extinguished or varied, she would likely be successful only if the underlying services or works obligation, to which it relates, were correspondingly extinguished or varied. This recommendation would permit the person to apply directly for the extinguishment or variation of the underlying obligation.

The court should have the power to order the extinguishment or variation of a development scheme or land obligation, whether or not imposed under a development scheme, upon such terms and conditions as it deems appropriate, and we so recommend. This power should include the right to impose a new or additional obligation upon any person, provided the person consents to undertake the burden. Where an order is sought to extinguish or vary a development scheme, or a land obligation imposed under a development scheme, and the consent of a person is required to undertake a new or additional obligation sought to be imposed by the court as a condition of the extinguishment or variation, the court should be empowered to dispense with the necessity of such consent, for the benefit of the scheme as a whole, where such consent is unreasonably withheld, or

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[202] *Supra*, note 99.

[203] *Supra*, this ch., sec. 2(b).

[204] *Supra*, ch. 2, sec. 5(e)(iii).

where such consent cannot be obtained because the person whose consent is required is under a disability or cannot be found and where it would have been unreasonable for such person to withhold consent. However, the court should be able to dispense with such consent only where it is satisfied that any prejudice caused to the person whose consent has been dispensed with would not outweigh substantially any benefit to such person resulting from the order.

As a condition of the variation or extinguishment of a land obligation, the court should also be empowered to direct that the applicant pay compensation to any person bound by the order for any loss or disadvantage the person will suffer as a result of its terms. As we discussed above,[205] the fact that the present statutory provisions do not provide for the payment of compensation has resulted in the statutory power being exercised with extreme judicial caution. This concern, it might be argued, has been taken to unwarranted lengths. Under our recommendations, the court would have the flexibility, in a proper case, to make the appropriate order, while awarding compensation to any persons bound by the order who might be adversely affected.

The court should also be empowered to give directions respecting the giving of notice to persons affected by the application.

An order of the court varying or extinguishing a land obligation should bind everyone who is, or who becomes, bound by or entitled to enforce the obligation. Similarly, an order of the court varying or extinguishing a development scheme should bind everyone who is, or who becomes, subject to the scheme. Where the order imposes new land obligations, however, the Commission recommends that it should specify expressly who is to be bound by it. Moreover, in all cases, an order of the court varying or extinguishing a land obligation or a development scheme should be registered on title to the land affected.

We now turn to consider the grounds upon which the court should be empowered to extinguish or vary a land obligation or a development scheme. At present, although the court is given the power to modify or discharge restrictive covenants,[206] it is given no statutory guidance as to the manner in which that power is to be exercised. We have concluded that, in the interests of certainty and consistency, the specific grounds upon which the court should be empowered to grant the extinguishment or variation of a land obligation or a development scheme should be enumerated. As we noted earlier in this Report,[207] this approach has been adopted in other jurisdictions.[208] Such an approach, in our view, will ensure that the power is

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[205] *Ibid.*

[206] See s. 61(1) of the *Conveyancing and Law of Property Act*, *supra*, note 49, and s. 118(5) of the *Land Titles Act*, *supra*, note 99.

[207] *Supra*, ch. 2, sec. 5(e)(iii).

[208] See, for example, s. 31(2) of the British Columbia *Property Law Act*, R.S.B.C. 1979, c. 340, reproduced *ibid*. See, also, *Law of Property Act 1925*, *supra*, note 30, s. 84, as am. by *Law of Property Act 1969*, c. 59, s. 28 (U.K.).

exercised in a principled and consistent fashion. Accordingly, the Commission recommends that the court should be empowered to extinguish or vary a land obligation or a development scheme on one or more of the following grounds:

(1) That the land obligation has become obsolete by reason of changes in the character of the servient land or of the neighbourhood.

(2) That the change will not injure the persons who have the benefit of the obligation.

(3) That the persons of full age and capacity who have the benefit of the obligation have expressly or impliedly agreed to the proposed changes.

(4) That the proposed change would remove a factor prejudicial to the carrying out of the general purposes of a development scheme, and

  (a) is for the benefit of the whole or part of the land subject to the scheme, and

  (b) the prejudice to any person bound by a land obligation under the scheme does not substantially outweigh the benefits it would give that person.

(5) That the land obligation, other than one requiring the payment of money,

  (a) impedes some reasonable user of the land, or would do so unless modified,

  (b) secures no practical value to anyone who has the benefit of it, and

  (c) the person who has the benefit can be adequately compensated for any loss or disadvantage.

(6) With respect to positive obligations, that, as a result of a change in circumstances, the obligation

  (a) has ceased to be reasonably practicable, or

  (b) has become unreasonably expensive compared to the benefit it confers.

(7) With respect to development schemes, or any provision contained in a development scheme, that, as a result of a change in circumstances, the scheme or the provision

  (a) has become obsolete,

(b) has ceased to be reasonably practicable, or

(c) has become unreasonably expensive compared to the benefit it confers.

(8) That, in respect of a land obligation in gross, the person who owns the benefit secures no real or substantial benefit from it.

(9) That a change is made necessary by an order of the court made on any of the other grounds.

The rationale underlying each of the first three grounds enumerated above (obsolescence, harmlessness, and agreement) is, essentially, self-evident. The fourth ground, removal of a factor prejudicial to the carrying out of the general purposes of a development scheme, is intended to permit the variation of both development schemes and land obligations imposed thereunder, in order to ensure that such schemes are able to adapt to altered circumstances.

The fifth ground would permit a land obligation that impedes some reasonable user of the land to be extinguished or varied where it secures no practical value or advantage to the person entitled to the benefit of it, and where money would be an adequate compensation. The present English provision,[209] which the English Report would retain,[210] provides for a broader power of modification and discharge by inclusion of a public interest criterion. This power was added pursuant to an earlier recommen-

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[209] Section 84 of the *Law of Property Act 1925*, *supra*, note 30, provides, in part, as follows:

> 84.—(1) The Lands Tribunal shall...have power...to discharge or modify any...restriction on being satisfied—
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> ....
>
> (aa) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user;
>
> ....
>
> (1A) Subsection (1)(aa) above authorizes the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Lands Tribunal is satisfied that the restriction, in impeding that user, either—
>
> (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
>
> (b) is contrary to the public interest;
>
> and that money will be adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

[210] English Report, *supra*, note 5, paras. 18.45-18.46, at 125-26.

dation of the Law Commission.[211] We have concluded, however, that the power of the court to extinguish or vary a land obligation should not include a similar reference to the public interest. Our concern is with the possibility that, where a land obligation impedes some reasonable user of the land, and is contrary to the public interest, it might be extinguished or varied even though the obligation secures a practical value to the person who has the benefit of it. Specifically, we are concerned with the notion that, in an effort to override private rights, a private individual should be permitted to invoke the public interest. Ordinarily, the public interest is invoked to override private rights only by a public authority, through the exercise of a specific statutory power and in accordance with a process intended to ensure political accountability. In our view, it would be inappropriate for the court to interfere with private rights, at the request of a private party, on the basis of the public interest.

The sixth ground of extinguishment or variation provides for the possibility that, as a result of a change in circumstances, the performance of a positive obligation has become unreasonably onerous or expensive. The next ground, in essence, would apply several of the other grounds to the extinguishment or variation of development schemes. The eighth ground applies to land obligations in gross, and would permit extinguishment or variation where no real or substantial benefit may be obtained from their enforcement. The last ground would permit the court to make any change necessary as anciliary to a change made on one of the other grounds.

Finally, the Commission recommends that, in determining whether a particular land obligation, other than a land obligation requiring the payment of money, should be extinguished or varied on one of the enumerated grounds, and in deciding whether a land obligation impedes some reasonable user of the land, within the fifth ground mentioned above, the court should take local planning matters into account.

(v) Accrued Rights and Liabilities

The Commission recommends that, subject to the power of the court to order the extinguishment or variation of a development scheme or land obligation upon such terms and conditions as it deems appropriate, where a

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[211] England, The Law Commission, *Transfer of Land*[:] *Report on Restrictive Covenants*, Law Com. No. 11 (1967), at 21. The recommendation was made as follows:

> [The section] should be re-written to give the Lands Tribunal powers of modifying or discharging land obligations wider than those which it has at the present time in respect of restrictive covenants. Under paragraph (a) of the subsection the Tribunal should be able to order modification or discharge where two requirements are satisfied; first, that the restriction is, or unless modified or discharged would be, detrimental to the public interest by impeding the reasonable user of land for public or private purposes; secondly, that the persons entitled to the benefit of the restriction can be adequately compensated in money for any disadvantage which they will suffer as a result of the order, so far as that disadvantage cannot be alleviated by the imposition of conditions in the order.

land obligation or a development scheme is extinguished or varied, any rights or liabilities that have accrued at the time of extinguishment or variation should not be affected. Of course, accrued rights for breach of a land obligation could be released in the same manner as other rights.

(m) Further Powers of the Court[212]

In the ordinary course of events, questions might arise concerning the applicability of a land obligation to particular land. In order to deal with these questions, the Commission recommends that the court should have the power, upon application, to declare:

(1) whether any land is, or, in any given circumstances would be, affected by a land obligation or a development scheme; and

(2) the nature and extent of a land obligation and whether the obligation is enforceable and, if so, by whom.

(n) Court Having Jurisdiction

In our view, the present statutory scheme embodied in the *Conveyancing and Law of Property Act*,[213] is satisfactory. The Commission therefore recommends that a judge of the Supreme Court, or a judge of the District Court of the county or district in which the land subject to a land obligation or development scheme is situate, should have jurisdiction to entertain an application for extinguishment or variation of a land obligation or develop-

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[212] See English Report, *supra*, note 5, paras. 19.1-19.12, at 128-29.

[213] Section 61(1) and (2) of the *Conveyancing and Law of Property Act*, *supra*, note 49, provides as follows:

> 61.—(1) Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of a judge of the Supreme Court or of the judge of the county or district court of the county or district in which the land or any part of it is situate.
>
> (2) Where an application under subsection (1) is made to the judge of a county or district court, a respondent may, by notice served on the applicant and on the other respondents, if any, and filed with proof of service thereof with the clerk of the county or district court not later than two days preceding the day of return of the application, require the proceedings to be removed into the Supreme Court.

By virtue of s. 159 of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, jurisdiction conferred upon a particular county or district court is deemed to be conferred on the District Court sitting in the county or district of the court named.

See, also, ss. 118(5), 1(a), and 24-27 of the *Land Titles Act*, *supra*, note 99, which provide for a somewhat different procedure for the modification and discharge of restrictive covenants affecting land registered under that Act.

ment scheme, and to exercise the declaratory powers set out in the preceding section. The Commission further recommends that the present right to remove a matter into the Supreme Court[214] and the right of appeal to the Divisional Court[215] should be retained.

(o) Expropriation

We noted earlier that there appear to be no cases in Ontario concerning the expropriation of land subject to a restrictive covenant.[216] Nor is the matter addressed in the *Expropriations Act*.[217] We have concluded that, in order to avoid any potential uncertainty, the *Expropriations Act* should be amended to include provisions, described below, dealing expressly with the expropriation of land subject to a land obligation.[218]

Specifically, the Commission recommends that the *Expropriations Act* should be amended to provide that where an expropriating authority acquires land that is dominant land in relation to a land obligation, it thereby acquires the benefit of the land obligation. Similarly, where an expropriating authority acquires land that is servient land in relation to a land obligation, the statute should be amended to provide that the land obligation is extinguished insofar as the use to which the authority intends to put the property is inconsistent with the land obligation, but not otherwise. Where, however, servient land is acquired by an expropriating authority for a limited time only,[219] the land obligation should be suspended for the period of the expropriation. These same rules should apply where an expropriating authority acquires part of a development scheme.

The Commission further recommends that the Act should be amended to provide that where an expropriating authority acquires land that is servient land in relation to a land obligation, the owner of the dominant land should be entitled to claim compensation for injurious affection.[220]

Finally, the Commission recommends that the Act should be amended to provide that the above rules apply whether land is expropriated or acquired by agreement under the legislation.[221]

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[214] See s. 61(2) of the *Conveyancing and Law of Property Act*, reproduced *supra*, note 213.

[215] *Conveyancing and Law of Property Act*, *supra*, note 49, s. 61(6), as am. by 1981, c. 66, s. 1.

[216] *Supra*, ch. 2, sec. 5(g).

[217] R.S.O. 1980, c. 148.

[218] See English Report, *supra*, note 5, paras. 21.3-21.12, at 137-39.

[219] See *Expropriations Act*, *supra*, note 217, s. 9(2).

[220] See *ibid.*, ss. 1(e) and 21.

[221] See *ibid.*, s. 24.

(p) Consequential Changes in the Existing Law

(i) The Continuing Law of Covenants

The recommendations made in this Report are intended to replace, in its entirety, the existing law respecting positive and restrictive covenants in freehold land. The question arises, therefore, as to the future treatment of existing covenants.[222] While it might be convenient if existing covenants were simply converted into land obligations, we are persuaded that this would present insuperable problems, described by the English Commission in the following terms:[223]

> The first main problem is one of definition. What covenants would be transformed in this way? It would be clearly wrong to transform all covenants. Those intended to be purely personal should not be transformed. Nor, it seems clear, should positive covenants: if positive covenants which do not run under the present law...were given effect as land obligations, this could only mean that obligations which had seemingly died were revived and imposed upon people who might not know of their existence. So the transformation would have to be confined to restrictive covenants—and confined, moreover, to those restrictive covenants which complied with the conditions imposed by the present law for such covenants to run with the land. This conclusion of itself goes far towards destroying the advantages of transformation, because if transformation applied only to covenants which ran under the old law, the old law would still have to be studied in order to determine whether a particular covenant had been transformed or not.

In addition to the difficulties identified above, such a solution would effect a retrospective change of rights and obligations, which cannot be countenanced. In the result, we have concluded that the recommendations made in this Report should apply only to land obligations created after the Commission's proposals take effect. Accordingly, the Commission recommends that the existing rules of law and equity respecting the running of the burden and the benefit of covenants should continue to apply to existing positive and restrictive covenants in freehold land, but should not apply to land obligations created after these proposals take effect. This recommendation, however, is subject to certain exceptions, discussed below.

The first exception concerns the standard covenants implied by the *Land Registration Reform Act, 1984*.[224] These covenants for title arise in a context that differs fundamentally from the context of land obligations.[225] Covenants for title, for example, do not involve dominant and servient land. The law respecting such covenants, therefore, does not mesh comfortably

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[222] See English Report, *supra*, note 5, paras. 24.1-24.38, at 147-55.

[223] *Ibid.*, para. 24.4, at 147.

[224] *Supra*, note 98, s. 5.

[225] See the discussion of covenants for title, *supra*, ch. 2, sec. 4(b)(iii).

with the proposed law of land obligations. Moreover, the former law respecting such covenants has worked reasonably well in practice. Accordingly, the Commission recommends that the covenants for title implied by section 5 of the *Land Registration Reform Act, 1984*, should be excepted from the general proposal.

The second exception relates to leasehold covenants. By "leasehold covenants" we refer to covenants that are entered into between persons who stand in a lessor-lessee relationship, and that are made in respect of the demised land. The law in respect of such covenants is relatively clear,[226] and, in any event, leasehold covenants are the subject of other recommendations of this Commission.[227] We have concluded, therefore, that the recommendations made in this Report in connection with land obligations should not apply to leasehold covenants.

The most obvious effect of this recommendation is to preserve the present law with respect to the running of the benefit and the burden of leasehold covenants at law, based upon the doctrine of privity of estate.[228] However, leasehold covenants also run in equity, by virtue of the equitable doctrine in *Tulk v. Moxhay*.[229] Thus, for example, a landlord may be entitled to enforce a restrictive covenant directly against a sublessee, notwithstanding the absence of privity of estate, by virtue of the equitable doctrine. Our recommendation that leasehold covenants should constitute an exception, therefore, would effectively retain the equitable doctrine of restrictive covenants insofar as it applies to leasehold covenants.

That is not to say, however, that our proposals in respect of land obligations would have no application in the landlord and tenant context. For example, where the lessor and lessee wish to create a covenant that would impose an obligation or confer a benefit on land other than the demised land, the covenant would have to be imposed as a land obligation if it is to run with the land. Moreover, to the extent that covenants imposed under a rental scheme confer reciprocal rights of enforcement among the respective lessees, they would be imposed as land obligations. On the other hand, to the extent that such covenants are enforceable by the lessor, they would be enforceable as leasehold covenants.

The third exception to our general recommendation relates to the doctrine in *Halsall v. Brizell*.[230] As we discussed earlier,[231] this doctrine has

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[226] Leasehold covenants are discussed *supra*, ch. 2, sec. 3.

[227] See Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976), ch. 3.

[228] See *supra*, ch. 2, sec. 3.

[229] *Supra*, note 63.

[230] [1957] Ch. 169, [1957] 1 All E.R. 371.

[231] See *supra*, ch. 2, sec. 4(c)(ii).

been used in England to circumvent the effect of the rule that the burden of positive covenants does not run with land. Its primary purpose, however, is to require that a person who claims the benefit of a deed must also discharge its burdens. We do not intend that this rule should be abolished.

The final exception is required to provide for the period of transition. A restrictive covenant created after our proposals take effect might have been made pursuant to an obligation or right to enter into the covenant that was granted before that date. In these circumstances, we have concluded that the covenant should be treated as if it had been created before our proposals took effect. We recommend, therefore, that such a covenant should be exempted from our general recommendation respecting the continued applicability of the present law of covenants. To provide otherwise, in our view, would interfere unduly with the legitimate expectations of the parties.

(ii) Statutory Amendments

Implementation of the recommendations made in this Report will require that a variety of statutory provisions be amended. Indeed, recommendations concerning many of these amendments have been made throughout this chapter. We have already recommended, for example, that amendments should be made to the *Conveyancing and Law of Property Act*,[232] the *Expropriations Act*,[233] the *Land Titles Act*,[234] the *Limitations Act*,[235] the *Perpetuities Act*,[236] and the *Registry Act*.[237] In addition, there are numerous statutory provisions that refer to covenants or other specific interests in land that ought to be made to refer to land obligations. For example, the *Land Registration Reform Act, 1984*,[238] Part III of the *Registry Act*,[239] section 9(5) of the *Municipal Tax Sales Act, 1984*,[240] and section 22 of the *Conveyancing and Law of Property Act*,[241] should be amended to make specific reference to land obligations, and we so recommend.

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[232] *Supra*, note 49. See the recommendations made *supra*, this ch., secs. 3(l)(iv) and (n).

[233] *Supra*, note 217. See the recommendations made *supra*, this ch., sec. 3(o).

[234] *Supra*, note 99. See the recommendations made *supra*, this ch., secs. 3(e) and (l)(ii).

[235] *Supra*, note 160. See the recommendations made *supra*, this ch., sec. 3(j).

[236] *Supra*, note 119. See the recommendations made *supra*, this ch., sec. 3(e).

[237] *Supra*, note 99. See the recommendations made *supra*, this ch., secs. 3(e) and (l)(ii).

[238] *Supra*, note 98.

[239] *Supra*, note 99. Part III of the Act provides for the expiration and renewal of certain claims.

[240] S.O. 1984, c. 48.

[241] *Supra*, note 49. Section 22 declares void certain covenants that restrict "the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person".

While we have thus identified the principal amendments required to implement our proposals, we have not attempted to compile an exhaustive list of all consequential amendments necessary to provide for the new interest in land. We have concluded that the Ministries responsible for the operation of the relevant statutes are best able to identify and implement any further consequential amendments that might be required. Accordingly, the Commission recommends that the Ministries should review such statutes for this purpose.

(q) Application to the Crown

The Commission recommends that the proposed regime respecting land obligations and development schemes should apply to the Crown in right of Ontario and, to the extent it is constitutionally permissible, to the Crown in right of Canada.

(r) Other Changes in the Existing Law

Although this Report deals primarily with land obligations, we are of the view that, since the existing rules of law and equity respecting the running of positive and restrictive covenants will continue to apply in limited circumstances,[242] it would be desirable for the Commission to make certain additional recommendations intended to reform the continuing law of covenants.

We noted in chapter 2 that, at common law, except under a deed poll, a person who is not a party to a deed cannot sue upon it.[243] This position has been changed, in England, by section 56 of the *Law of Property Act 1925*,[244] which provides, in part, as follows:

> 56.—(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

The effect of this provision has been described in the following terms:[245]

> To [an] extent this provision has abolished the common law rule requiring anyone claiming any benefit under a deed to be named as a party to it, and so it extends in an important way the class of persons who can be brought within the benefit of a covenant. For example, if V sells land to P, and P enters into a covenant with V 'and also with the owners for the time being' of certain

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[242] See *supra*, this ch., sec. 3(p)(i).

[243] *Supra*, ch. 2, sec. 4(b)(i).

[244] *Law of Property Act 1925*, *supra*, note 30.

[245] Megarry and Wade, *supra*, note 27, at 763.

> adjacent plots of land, the persons who are the adjoining owners at the time of the covenant can sue, for although they are not named as parties to the conveyance, they are convenantees just as much as is V; and if the benefit of the covenant is capable of running with land...it can benefit the successors in title of the adjoining owners.

The Commission recommends that a provision similar in effect to section 56 of the *Law of Property Act 1925*[246] should be incorporated into the *Conveyancing and Law of Property Act*.[247]

We turn now to section 78 of the *Law of Property Act 1925*,[248] which provides, in part, as follows:

> 78.—(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.
>
> For the purpose of this subsection in connexion with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

As we discussed in chapter 2,[249] it has been held in England that if a covenant touches and concerns the land, the effect of section 78 is that annexation is automatic.[250] In effect, section 78 establishes that the covenant is intended for the benefit of the covenantee and his successors, rather than the personal benefit of the covenantee. While a comparable section does exist in Ontario,[251] it has been drafted more narrowly. As a result, it is possible that the Ontario provision might not be interpreted as having the same salutary effect as the English provision. Accordingly, the Commission recommends that section 24 of the *Conveyancing and Law of Property Act* should be replaced by a provision similar in effect to section 78 of the *Law of Property Act 1925*.

Earlier in this Report[252] we noted that one of the requirements for the burden of a restrictive covenant to run with servient land under the

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246 *Supra*, note 30.

247 *Supra*, note 49.

248 *Supra*, note 30.

249 *Supra*, ch. 2, sec. 5(c)(iii)a.

250 *Federated Homes Ltd. v. Mill Lodge Properties Ltd.*, [1980] 1 W.L.R. 594, [1980] 1 All E.R. 371 (C.A.). However, as we also discussed, *supra*, ch. 2, note 197, it has been held that the true nature of the covenant must be determined from a consideration of the covenant as a whole. See *Roake v. Chadha*, [1984] 1 W.L.R. 40, [1983] 3 All E.R. 503 (Ch. D.).

251 Section 24 of the *Conveyancing and Law of Property Act*, *supra*, note 49, reproduced *supra*, ch. 2, note 198.

252 *Supra*, ch. 2, sec. 5(b)(iv).

equitable doctrine is that the covenant must not have been intended to create a personal obligation of the covenantor; rather, it must have been intended to create a burden upon the covenantor's land. It must have been made, therefore, either expressly or impliedly on behalf of the covenantor's heirs and assigns as well as on behalf of the covenantor. Section 79 of the *Law of Property Act 1925*[253] has altered this position in England by providing, in part, as follows:

> 79.—(1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
>
> This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.
>
> (2) For the purposes of this section in connexion with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of such land.

By virtue of this section, it is no longer necessary, in England, to covenant on behalf of the heirs and assigns of the covenantor. The Commission recommends that a provision similar in effect to section 79 of the *Law of Property Act 1925*[254] should be incorporated into the *Conveyancing and Law of Property Act*.[255]

The common law contained a number of lacunae in the law related to covenants. These have been removed by legislation in other jurisdictions, and we recommend below that similar legislation should be enacted in Ontario.

First, a covenant that bound the covenantor's estate bound his personal estate only; it did not bind his real property. Secondly, the benefit and the burden of a covenant, at common law, did not pass automatically to the personal representatives of the persons benefited or bound by the covenant. Thirdly, certain technical requirements had to be satisfied in order to make the benefit of a covenant run with land. Section 80 of the *Law of Property Act 1925* resolves these deficiencies, as follows:

> 80.—(1) A covenant and a bond and an obligation or contract under seal made after the thirty-first day of December, eighteen hundred and eighty-one, binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, obligation, or contract.
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> This subsection extends to a covenant implied by virtue of this Act.

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[253] *Supra*, note 30.

[254] *Ibid.*

[255] *Supra*, note 49.

(2) Every covenant running with the land, whether entered into before or after the commencement of this Act, shall take effect in accordance with any statutory enactment affecting the devolution of the land, and accordingly the benefit or burden of every such covenant shall vest in or bind the persons who by virtue of any such enactment or otherwise succeed to the title of the covenantee or the covenantor, as the case may be.

(3) The benefit of a covenant relating to land entered into after the commencement of this Act may be made to run with the land without the use of any technical expression if the covenant is of such a nature that the benefit could have been made to run with the land before the commencement of this Act.

(4) For the purposes of this section, a covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor, as the case may be.

A further difficulty was created by the common law rule that prohibited a person from covenanting with himself. It followed from that rule that a person also could not covenant with himself and others, although this is a relatively common occurrence. This problem was cured by section 82 of the *Law of Property Act 1925*,[256] which provides:

82.—(1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.

(2) This section applies to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the court made before such commencement.

The common law also caused various interpretational difficulties in the context of covenants. Section 83 of the *Law of Property Act 1925*[257] addresses these difficulties as follows:

83. In the construction of a covenant or proviso, or other provision, implied in a deed or assent by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

The Commission recommends that provisions similar in effect to sections 80, 82, and 83 of the *Law of Property Act 1925*,[258] should be incorporated into the *Conveyancing and Law of Property Act*.[259]

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256 *Supra*, note 30.

257 *Ibid.*

258 *Ibid.*

259 *Supra*, note 49.

Finally, we refer to section 117 of the Trinidad and Tobago *Land Law and Conveyancing Act, 1981*,[260] which provides as follows:

> 117.—(1) Subject to the provisions of this Act, where under a covenant more persons than one are—
>
> (a) covenantors, the covenant binds the covenantors and any two or more of them jointly and severally and each of them severally;
>
> (b) covenantees, the covenant shall be construed as being also made with each of them.
>
> (2) This section—
>
> (a) extends to a covenant implied under this or any other Act;
>
> (b) applies only if and as far as a contrary intention is not expressed in the covenant, and applies only to covenants entered into after the commencement of this Act or implied by this or any Act.

This section would appear to overcome the difficulty that arose in *Thistle v. Thistle*.[261] In that case, a husband and wife owned a matrimonial home as joint tenants. Pursuant to a divorce settlement, the home was conveyed by the husband and wife, jointly, to the wife alone. At the time of the conveyance, however, the husband's interest in the property was subject to the interest of an execution creditor. The wife satisfied the creditor's claim, and brought an action against the husband for breach of the covenants of title and quiet enjoyment contained in the conveyance. It was held that, since no words of severence were contained in the deed, the plaintiff and the defendant had covenanted jointly, not jointly and severally.[262] It was further held that, since a person cannot sue herself, and since the covenant was joint and not several, the plaintiff could not "maintain an action on the covenant against her joint covenantor".[263]

In order to avoid such a result in Ontario, the Commission recommends that a provision similar in effect to section 117 of the *Land Law and Conveyancing Act, 1981*,[264] should be incorporated into the *Conveyancing and Law of Property Act*.[265]

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[260] *Supra*, note 82.

[261] (1980), 42 N.S.R. (2d) 43, 110 D.L.R. (3d) 137 (S.C., T.D.) (subsequent references are to 110 D.L.R. (3d)).

[262] *Ibid.*, at 142.

[263] *Ibid.*, at 144.

[264] *Supra*, note 82.

[265] *Supra*, note 49.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

GENERAL RECOMMENDATIONS

1. (1) Restrictive covenants should be retained.

   (2) The existing equitable doctrine of restrictive covenants should be reformed to remove the present complexity and uncertainty.

2. The law should be reformed to permit the burden of positive covenants to run upon a transfer of freehold land.

SPECIFIC RECOMMENDATIONS

The Land Obligation: General

3. (1) A new interest in land, to be called a "land obligation", should be created in Ontario.

   (2) Land obligations should comprehend both positive and restrictive obligations, and should permit both the benefit and the burden of such obligations to run upon a transfer of freehold land.

   (3) A land obligation should be capable of existing as a legal or equitable estate in fee simple, for life, or for a term of years.

The Necessity of Land obligations Being Appurtenant to an Estate

4. (1) The benefit of a land obligation, other than the benefit of a land obligation that exists in gross (see Recommendation 5), should be appurtenant to, and run with, the dominant land, not with an estate therein.

   (2) The burden of a land obligation should be appurtenant to, and run with, the servient land, not with an estate therein.

Land Obligations in Gross

5. The benefit of land obligations should be permitted to exist either as appurtenant to land or in gross, that is, without the necessity of dominant land.

The Content of Land Obligations

6. Any obligation should be capable of being imposed as a land obligation, including:

    (a) restrictive obligations;

    (b) positive obligations;

    (c) reciprocal payment obligations;

    (d) positive user obligations; and

    (e) access obligations.

7. (1) It should be possible to include the following types of supplementary provision in the instrument creating a land obligation:

    (a) *Information*. A provision giving a right to information or to the production of documents.

    (b) *Inspection*. A provision enabling any person entitled to enforce a land obligation to inspect the servient land in order to see whether it has been complied with.

    (c) *Self-help*. A provision enabling anyone entitled to enforce a land obligation requiring the carrying out of works to enter the servient land and carry them out himself in the event of non-compliance.

    (d) *Fund*. A provision relating to the keeping of a fund out of which expenditure on the carrying out of works, or the provision of services, is to be met. A provision of this kind can be made whenever a works or services obligation is coupled with a reciprocal payment obligation, and can be made to take effect as part of either obligation.

    (e) *Interest*. A provision requiring the payment of interest if default is made in complying with a reciprocal payment obligation.

    (2) Supplementary provisions included in the instrument creating a land obligation should take effect as part of the land obligation.

DEVELOPMENT SCHEMES

8. (1) Provision should be made for the creation of development schemes, under which land obligations might be imposed and become binding upon, and mutually enforceable by, the owners of the individual units comprising the scheme.

   (2) Any person should be permitted to create a development scheme.

   (3) The instrument should define the land obligations to be imposed thereunder.

9. The dominant land and the servient land in respect of each land obligation imposed under a development scheme should be the specific unit or units benefited or bound by the particular obligation.

10. (1) A development scheme should be able to provide for different obligations to be imposed upon different units, or for some units to be free of obligations.

    (2) A development scheme should be able to provide for the following:

    (a) the variation or extinguishment of the scheme itself;

    (b) the variation, release, apportionment and extinguishment of any land obligation imposed under the scheme; and

    (c) any other matter desired by the parties.

11. (1) Where a manager, residents' association, or other person performing similar functions has been created or appointed under a development scheme, that person should have the power to enforce all land obligations imposed under the scheme, unless the development scheme provides to the contrary.

    (2) Where a land obligation is enforceable by a manager, residents' association, or other person performing similar functions, the obligation should not be enforceable by the individual owners of the units benefited by the obligation, unless express provision to that effect is made in the development scheme.

12. The creator of a development scheme should be bound by the scheme and have rights of enforcement under it while he or she owns land subject to the scheme.

13. In addition to the ordinary case, in which a development scheme is created by a developer prior to the sale of the individual lots in a subdivision, the several owners of separate parcels of land, as well as a lessor, should be able to create a development scheme.

14. The benefit of a land obligation imposed under a development scheme should be permitted to exist either as appurtenant to land or in gross.

CREATION AND REGISTRATION OF LAND OBLIGATIONS AND DEVELOPMENT SCHEMES

15. (1) Development schemes and land obligations imposed outside of development schemes should be created only by instrument in writing, signed by the person or persons creating the development scheme or land obligation.

(2) There should be no requirement that a land obligation or a development scheme must be executed under seal.

16. (1) In respect of each development scheme, the instrument should state that it creates a development scheme, and it should describe the land to which it applies with the particularity required by the land registration statutes.

(2) In respect of each land obligation, whether or not such obligation is imposed under a development scheme, the instrument should state that it creates a land obligation, and it should describe both the servient land and, where the benefit of the obligation does not exist in gross, the dominant land with the particularity required by the land registration statutes.

17. In the event that the formal requirements are not satisfied, the instrument should be deemed conclusively not to create a land obligation or a development scheme (although, in such a case, the instrument might create a personal covenant or other obligation).

18. (1) Both land obligations and development schemes, including a subsequent variation or extinguishment thereof, should be registrable under the *Land Titles Act* and the *Registry Act*.

(2) When a development scheme or a land obligation, or a variation or extinguishment thereof, is submitted for registration, it should be registered on the title to every parcel described in the instrument.

(3) To the extent necessary, the *Land Titles Act* and the *Registry Act* should be amended to permit such registration.

19. (1) Upon first registration of land under the *Land Titles Act*, land burdened or benefited by a land obligation should be registered as subject to, or as having the benefit of, the obligation.

(2) A land obligation should not take effect as an overriding interest under section 47 of the *Land Titles Act*.

(3) Section 81(5) of the *Land Titles Act* should be amended to ensure that, in all cases, land obligations are entitled to priority according to the time of their registration.

(4) The *Land Titles Act* should be amended to provide expressly that a prior registered land obligation has priority over a subsequent unregistered lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it.

20. The *Registry Act* should be amended to provide as follows:

(a) that the doctrine of actual notice, contained in section 65(1), does not apply to land obligations; and

(b) that a prior registered land obligation has priority over a subsequent unregistered lease for a term not exceeding seven years where the actual possession goes along with the lease.

21. The rule against perpetuities, as amended by the *Perpetuities Act*, should not apply to land obligations.

The Benefit of Land Obligations

22. (1) Where the benefit of a land obligation exists as appurtenant to land, the owner or occupier, from time to time, of all or part of the dominant land should be able to enforce the obligation.

(2) (a) Subject to paragraph (b) below, where the benefit of a land obligation exists in gross, the owner of the benefit, from time to time, should be able to enforce the obligation.

(b) A subsequent owner of the benefit of a land obligation in gross should be able to enforce the obligation only if the benefit is assignable, and if it is in fact assigned.

23. Once the owner of the dominant land has ceased to hold any interest in that land, or, once the owner of a land obligation in gross has assigned the benefit of the obligation, as the case may be, the owner should no longer be able to enforce the obligation, unless the parties have agreed expressly to the contrary.

24. An adverse possessor of the dominant land should be able to enforce a land obligation, whether or not he or she has acquired an indefeasible title.

THE BURDEN OF LAND OBLIGATIONS

25. (1) Restrictive and access obligations should be binding upon everyone who, for the time being, has an estate or interest in, or who, for the time being, is in occupation of, the servient land or any part thereof.

(2) Land obligations, other than restrictive and access obligations, should be binding only upon the following persons, so long as they hold their interest in the servient land or any part thereof:

(a) persons who have a subsequent freehold interest and who have a right of possession;

(b) persons who hold an interest in a subsequent lease that is for a term exceeding twenty-one years and who have a right of possession;

(c) subsequent mortgagees and other encumbrancers;

(d) the person who created the land obligation, and his or her successors in title; and

(e) adverse possessors, whether or not they have acquired an indefeasible title.

26. (1) In accordance with the general rules of priority, no one should be bound by a land obligation if he or she has priority over it by virtue of a prior registered interest or if he or she acquired a derivative interest from, or occupies under, such a person.

(2) A lease referred to in section 65(2) of the *Registry Act* or section 47(1)4 of the *Land Titles Act* should not be bound by a subsequent land obligation.

27. It should be possible for the owner of the dominant land, or the owner of the benefit of a land obligation in gross, to postpone his or her priority in favour of a subsequent encumbrancer of the servient land.

28. The parties to a land obligation should be able to restrict the class of persons who should be bound by it.

29. Unless a contrary intention appears expressly in the creating instrument, the original maker of a land obligation should be discharged of the burden once he or she has parted with all interest in the land.

LIABILITY FOR CONTRAVENTIONS OF LAND OBLIGATIONS

30. (1) All persons bound by positive obligations, reciprocal payment

obligations and positive user obligations should be liable for a contravention.

(2) (a) Only the person bound by a restrictive or access obligation who actually committed the breach should be liable.

(b) Where a person bound by a restrictive or access obligation has permitted or suffered a breach to be committed by another person, the person bound by the obligation who permitted or suffered the breach should be held liable.

31. Subsequent mortgagees, chargees, and holders of other security should be liable for breach of a land obligation only if they were in possession of the servient land at the time of the breach.

32. Where a breach is of a continuing nature, the person or persons who caused the breach, as well as his or her, or their, successors, should remain and be liable so long as the breach continues.

33. The parties should be able to vary the rules set out in Recommendations 30-32, either in the original instrument creating the interest or in a subsequent instrument, for the purpose of restricting the circumstances in which a person may be held liable for the contravention of a land obligation.

34. In accordance with the recommendation made in our *Report on Contribution Among Wrongdoers and Contributory Negligence* that there should be a right of contribution among all concurrent wrongdoers, whatever the legal nature of their liability, a right of contribution should exist among all persons who are liable for breach of a positive obligation, reciprocal payment obligation, or positive user obligation.

Remedies for Contraventions

35. (1) The following remedies should be available upon a contravention of a land obligation:

(a) an injunction (including a mandatory injunction) or other equitable relief;

(b) damages for moneys due under a land obligation; and

(c) damages, both for pecuniary and non-pecuniary kinds of loss.

(2) An injunction should be available upon a threatened contravention of a land obligation.

36. A right of re-entry upon the servient land should not be permitted.

37. The parties to a land obligation should be free to provide, either in the original instrument creating the interest or in a subsequent instrument, that, on breach of a land obligation, one or more types of liability shall be excluded, either in whole or in part.

38. A person should be entitled to a remedy in respect of a contravention only to the extent to which he or she is materially prejudiced by the breach, in the capacity in which he or she is entitled to enforce the obligation.

39. Common law damages should be available only against the following:

    (a) the person who entered into the obligation and his or her successors in title;

    (b) a mortgagee; and

    (c) a person who has a right to possession and has either a freehold interest or a leasehold interest for a term exceeding twenty-one years.

40. In any action for damages for breach of a land obligation, the right to damages should be subject to any apportionment of damages due to the contributory fault or neglect of the person enforcing the obligation.

LIMITATION OF ACTIONS

41. (1) The limitation period applicable to actions in respect of land obligations should be the same as for other actions in respect of land, that is, a period of ten years.

    (2) The statutory ten year limitation period should apply expressly with respect to all remedies for breach of a land obligation, including equitable remedies.

    (3) (a) A cause of action for contravention of a land obligation should arise when the contravention occurs.

    (b) Subject to the ordinary statutory rules providing for the postponement, suspension, or extension of the limitation period in certain circumstances, and subject to paragraph (c) below, the limitation period in respect of a cause of action for contravention of a land obligation should begin to run when the cause of action arises.

    (c) Where the contravention is of a continuing nature, time should not start to run until the contravention has ceased.

Determining the Identity of Persons Liable

42. (1) Any person entitled to enforce a land obligation should be permitted to serve a notice upon anyone in occupation of the whole or any part of the servient land, or upon anyone who has, or who appears to have, an interest in the whole or any part of the servient land.

(2) The person served with the notice should be required to respond, in writing, within one month of the date of service, and should be required to include in his or her response the nature of any estate or interest he or she might have in the whole or any part of the servient land, as well as the name and address of any other person he or she knows or believes to have an estate or interest in the whole or any part of the servient land.

Extinguishment and Variation

Extinguishment by Common Ownership

43. A land obligation should be extinguished if the whole of the servient land and the whole of the dominant land come into the ownership of the same person, in the same right, and if no other person is bound by, or has the benefit of, the obligation.

44. Where part only of the dominant land and all or part of the servient land come into common ownership, land obligations should not be extinguished.

45. Where all of the dominant land and part only of the servient land come into common ownership:

(a) restrictive and access obligations should be extinguished to the extent that they relate to the part of the servient land that has come into common ownership; and

(b) land obligations other than restrictive and access obligations should not be extinguished.

46. There should be no extinguishment of a development scheme, or any land obligation imposed thereunder, unless all the units comprising the scheme come into the ownership of the same person, in the same right, and no one else is bound by or has the benefit of any land obligations imposed under the scheme.

47. Where a land obligation or a development scheme is extinguished pursuant to the other recommendations, any rights or liabilities that have accrued at the time of extinguishment should not be affected.

48. Where a lessee is bound by a land obligation that does not bind the lessor:

    (a) if the lease is merged in the reversion, the obligation should continue to bind the person who owns the estate resulting from the merger of the lease and the reversion for so long as the obligation would have bound the original creator; and

    (b) if the lease is forfeited by the landlord due to the fault of the lessee, the land obligation should terminate.

Extinguishment by Operation of the Recording Acts

49. Land obligations and development schemes should be extinguished automatically at the end of a period of forty years, unless renewed (see Recommendation 50).

50. (1) It should be possible, from time to time, to renew a land obligation or development scheme.

    (2) The *Land Titles Act* should be amended to permit the renewal of a land obligation or development scheme registered under that Act.

Extinguishment and Variation by the Parties

51. Where some, but not all, of the persons bound by or entitled to enforce a land obligation agree in writing to vary an obligation, the variation should be binding not only upon the parties to it, but, provided it is registered on title, also upon their successors and subsequent adverse possessors of all or part of their land.

Extinguishment and Variation by the Court

52. The court should have the power to extinguish or vary any land obligation (including any land obligation imposed under a development scheme) as well as any development scheme.

53. (1) Anyone interested in all or part of the servient land, including a purchaser under an agreement of purchase and sale, as well as an optionee, should have the right to apply to the court for an order extinguishing or varying a land obligation or a development scheme.

    (2) Anyone interested in servient land bound by a reciprocal payment obligation should be permitted to apply for the extinguishment or variation not only of the reciprocal payment obligation itself, but also of the services or works obligation to which it relates.

54. (1) The court should have the power to order the extinguishment or variation of a development scheme or land obligation, whether or not imposed under a development scheme, upon such terms and conditions as it deems appropriate.

(2) The power referred to in paragraph (1), above, should include the right to impose a new or additional obligation upon any person, provided the person consents to undertake the burden.

(3) Subject to paragraph (4), below, where an order is sought to extinguish or vary a development scheme, or a land obligation imposed under a development scheme, and the consent of a person is required to undertake a new or additional obligation sought to be imposed by the court as a condition of the extinguishment or variation, the court should be empowered to dispense with the necessity of such consent, for the benefit of the scheme as a whole, where such consent is unreasonably withheld, or where such consent cannot be obtained because the person whose consent is required is under a disability or cannot be found and where it would have been unreasonable for such person to withhold consent.

(4) The court should be able to dispense with consent under paragraph (3), above, only where it is satisfied that any prejudice caused to the person whose consent has been dispensed with would not outweigh substantially any benefit to such person resulting from the order.

(5) As a condition of the variation or extinguishment of a land obligation, the court should be empowered to direct that the applicant pay compensation to any person bound by the order for any loss or disadvantage the person will suffer as a result of its terms.

(6) The court should be empowered to give directions respecting the giving of notice to persons affected by the application.

55. (1) An order of the court varying or extinguishing a land obligation should bind everyone who is, or who becomes, bound by or entitled to enforce the obligation.

(2) An order of the court varying or extinguishing a development scheme should bind everyone who is, or who becomes, subject to the scheme.

(3) Where the order imposes new land obligations, it should specify expressly who is to be bound by it.

(4) An order of the court varying or extinguishing a land obligation or a development scheme should be registered on title to the land affected.

56. The court should be empowered to extinguish or vary a land obligation or a development scheme on one or more of the following grounds:

(a) that the land obligation has become obsolete by reason of changes in the character of the servient land or of the neighbourhood;

(b) that the change will not injure the persons who have the benefit of the obligation;

(c) that the persons of full age and capacity who have the benefit of the obligation have expressly or impliedly agreed to the proposed changes;

(d) that the proposed change would remove a factor prejudicial to the carrying out of the general purposes of a development scheme, and

(i) is for the benefit of the whole or part of the land subject to the scheme, and

(ii) the prejudice to any person bound by a land obligation under the scheme does not substantially outweigh the benefits it would give that person;

(e) that the land obligation, other than one requiring the payment of money,

(i) impedes some reasonable user of the land, or would do so unless modified,

(ii) secures no practical value to anyone who has the benefit of it, and

(iii) the person who has the benefit can be adequately compensated for any loss or disadvantage;

(f) with respect to positive obligations, that, as a result of a change in circumstances, the obligation

(i) has ceased to be reasonably practicable, or

(ii) has become unreasonably expensive compared to the benefit it confers;

(g) with respect to development schemes, or any provision contained in a development scheme, that, as a result of a change in circumstances, the scheme or the provision

(i) has become obsolete,

(ii) has ceased to be reasonably practicable, or

(iii) has become unreasonably expensive compared to the benefit it confers;

(h) that, in respect of a land obligation in gross, the person who owns the benefit secures no real or substantial benefit from it; and

(i) that a change is made necessary by an order of the court made on any of the other grounds.

57. In determining whether a particular land obligation, other than a land obligation requiring the payment of money, should be extinguished or varied on one of the above grounds, and in deciding whether a land obligation impedes some reasonable user of the land, within Recommendation 56(e), above, the court should take local planning matters into account.

Accrued Rights and Liabilities

58. Subject to the power of the court to order the extinguishment or variation of a development scheme or land obligation upon such terms and conditions as it deems appropriate (see Recommendation 54(1)), where a land obligation or a development scheme is extinguished or varied, any rights or liabilities that have accrued at the time of extinguishment or variation should not be affected.

Further Powers of the Court

59. The court should have the power, upon application, to declare:

(a) whether any land is, or, in any given circumstances would be, affected by a land obligation or a development scheme; and

(b) the nature and extent of a land obligation and whether the obligation is enforceable and, if so, by whom.

Court Having Jurisdiction

60. (1) A judge of the Supreme Court, or a judge of the District Court of the county or district in which the land subject to a land obligation or development scheme is situate, should have jurisdiction to entertain an application for extinguishment or variation, and to exercise the declaratory powers set out in Recommendation 59.

(2) The right to remove a matter into the Supreme Court and the right of appeal to the Divisional Court should be retained.

EXPROPRIATION

61. The *Expropriations Act* should be amended to provide as follows:

    (a) where an expropriating authority acquires land that is dominant land in relation to a land obligation, it thereby acquires the benefit of the land obligation;

    (b) where an expropriating authority acquires land that is servient land in relation to a land obligation, the land obligation is extinguished insofar as the use to which the authority intends to put the property is inconsistent with the land obligation, but not otherwise;

    (c) where servient land is acquired by an expropriating authority for a limited time only, the land obligation is suspended for the period of the expropriation;

    (d) the same rules apply where an expropriating authority acquires part of a development scheme;

    (e) where an expropriating authority acquires land that is servient land in relation to a land obligation, the owner of the dominant land is entitled to claim compensation for injurious affection; and

    (f) the above rules apply whether land is expropriated or acquired by agreement under the legislation.

CONSEQUENTIAL CHANGES IN THE EXISTING LAW

The Continuing Law of Covenants

62. (1) Subject to the exceptions noted in paragraph (2), below, the existing rules of law and equity respecting the running of the burden and the benefit of covenants should continue to apply to existing positive and restrictive covenants in freehold land, but should not apply to land obligations created after these proposals take effect.

    (2) The recommendation contained in paragraph (1) should not apply to the following:

        (a) the covenants for title implied by section 5 of the *Land Registration Reform Act, 1984*;

        (b) leasehold covenants;

        (c) the doctrine in *Halsall v. Brizell*; and

(d) a restrictive covenant that is created after our proposals take effect, but that is made pursuant to an obligation or right to enter into the covenant granted before that date.

Statutory Amendments

63. (1) The *Land Registration Reform Act, 1984*, Part III of the *Registry Act*, section 9(5) of the *Municipal Tax Sales Act, 1984*, and section 22 of the *Conveyancing and Law of Property Act*, should be amended to make specific reference to land obligations.

(2) The Ministries of the Government of Ontario should review the statutes for which they are responsible, for the purpose of identifying and implementing any further consequential amendments necessary to provide for land obligations.

APPLICATION TO THE CROWN

64. The proposed regime respecting land obligations and development schemes should apply to the Crown in right of Ontario and, to the extent it is constitutionally permissible, to the Crown in right of Canada.

OTHER CHANGES IN THE EXISTING LAW

65. The *Conveyancing and Law of Property Act* should be amended as follows:

(a) a provision should be added similar in effect to section 56 of the English *Law of Property Act 1925*;

(b) section 24 should be replaced by a provision similar in effect to section 78 of the *Law of Property Act 1925*;

(c) a provision similar in effect to section 79 of the *Law of Property Act 1925*, should be added;

(d) provisions similar in effect to sections 80, 82, and 83 of the *Law of Property Act 1925*, should be added; and

(e) a provision similar in effect to section 117 of the Trinidad and Tobago *Land Law and Conveyancing Act, 1981*, should be added.

CONCLUSION

In this Project, we have reviewed the law respecting positive and restrictive covenants in freehold land, with a view to resolving two fundamental issues. The first is whether, and if so to what extent, the burden of positive covenants should be permitted to run with land, such that the obligation would be enforceable against successors of the original covenantor. The second is whether, and if so to what extent, the present law of restrictive covenants is in need of reform.

With respect to both issues, the Commission has concluded that substantial reform measures are warranted, and that such reforms would be best accomplished through the creation of a new interest in land. This new servitude, which we have referred to as a "land obligation", would comprehend both positive and restrictive obligations, and is designed to provide for the differing requirements of each. In addition, both the benefit and the burden of land obligations would be permitted to run upon a transfer of freehold land. The Commission has also made a number of specific recommendations that would provide a comprehensive scheme for the operation of land obligations.

In the Introduction to this Report, we expressed our appreciation to Professor A.H. Oosterhoff, of the Faculty of Law, University of Western Ontario, for his contribution to our study. We wish, once again, to record our thanks to Professor Oosterhoff for his able assistance.

Finally, we wish to thank Mr. Jody Morrison, of the Commission's legal staff, for his dedication in bringing this Project to a successful conclusion. His ability to master this complex area of the law is reflected throughout the Report.

All of which is respectfully submitted.

James R. Breithaupt
Chairman

H. Allan Leal
Vice Chairman

Earl A. Cherniak
Commissioner

J. Robert S. Prichard
Commissioner

Margaret A. Ross
Commissioner

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